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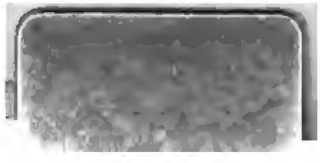

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

WITH

TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL MATTERS.

BY JOHN BAYLY MOORE,

OF THE INNER TEMPLE, ESQ.

VOL. VI.

CONTAINING THE CASES FROM TRINITY TERM, 2 GEO. IV. 1821, TO HILARY TERM, 2 & 3 GEO. IV. 1822, BOTH INCLUSIVE.

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1824.

JUDGES

OF THE

COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir ROBERT DALLAS, Knt. Lord Chief Justice.
The Hon. Sir JAMES ALLAN PARK, Knt.
The Hon. Sir JAMES BURROUGH, Knt.
The Hon. Sir JOHN RICHARDSON, Knt.

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ERRATUM.

In page 55, line 11, after the word "*agreement*," insert "*in writing*."

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN TRINITY TERM,

IN THE SECOND YEAR OF THE REIGN OF GEO. IV.

MEDLYCOTT *v.* JORTIN.

THE following case was sent by the direction of the Vice Chancellor for the opinion of the Judges of this Court:—

Devise of an estate at *Irchester* to devisor's grand-daughter *A.* for her life; remainder to two trustees during the life of *A.* in trust only, to support contingent estates; and after her decease, to all

Mr. Serjeant *Hill*, on the 8th *December*, 1806, made his will in writing, of which the following is an exact copy:

"This is the last will and testament of me *George Hill*, of *Rowell*, one of his Majesty's Serjeants at Law. I devise and every the children in tail, with cross remainders between them in tail; and in default of issue of all and every the children of the devisor's grand-daughter, he devised to his daughter *B.* for life; remainder to such one or more of the children of *B.* as she by deed or will, attested by three witnesses, duly executed, should appoint, for their lives; remainder to all and every the child and children of such daughter or daughters, to be appointed by *B.* as aforesaid; and if only one should be appointed, then to her and the heirs of her body; and if more than one should be appointed, then all of them to take their mothers' shares *per stirpes*, as tenants in common, and not as joint tenants; with cross remainders between them (the children of such daughters), as to their mothers' shares in tail; and on failure of such issue of any one or more of such daughters, with cross remainders to the others of their issue: and in default of such appointment, and of any appointment not exhausting the whole fee, the devisor gave the estate at *Irchester*, or so much of the fee as should not be exhausted by such

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my estate at *Irchester*, to my grand-daughter, *Ann Maunsell*, for her life; with remainder to my friends, *John William Bramston* and *John Jortin*, barristers at law, and their heirs, in trust, only for and upon the several uses and trusts hereinafter mentioned, (that is to say) for and during the life of my said grand-daughter, in trust only, to support the contingent estates hereinafter devised; and after her decease, to all and every the children in tail, with cross remainders between them in tail: and in default of issue of all and every the children of my said grand-daughter, I devise the said estate to my daughter, *Barbara Cockayne Medlycott*, for life; with remainder to any such one or more of the children of such my said daughter as my said daughter shall, by deed or will, attested by three witnesses, appoint for their lives; with remainder to all and every the child and children of such daughter or daughters, to be appointed by my said daughter, as aforesaid; and if only one be appointed, then to her and the heirs of her body; and if more than one be appointed, then all of them to take their mother's shares, *per stirpes*, as tenants in common, and not as joint tenants; with cross remainders between them, the children of

such appointment made as aforesaid, to *B.* for life; with remainder to all her daughters for their lives, with cross remainders between them for life; with remainder, during the lives of all the daughters of *B.*, and the life of the survivor, to support contingent remainders; and for default of issue of any or either of the daughters then living of *B.* he devised the said estate to *B.* and her heirs. *A.* died sole and intestate, leaving *B.* her heir-at-law as well as the heir-at-law of the devisor. *B.* had issue, nine daughters, many of whom were married and had issue:—Held, first, that *B.* had in the freehold and copyhold lands of the devisor an estate for her life, with an ultimate reversion to herself in fee. Secondly, that in default of appointment, her daughters then living had respectively, in the said lands of the testator, estates for life in remainder, as tenants in common, with cross remainders amongst themselves for life, with remainders to themselves in tail respectively. Thirdly, that in default of appointment, the grand-children of *B.* had no estate in the testator's said lands. Fourthly, that *B.* had power by appointment to designate which one or more than one of her daughters was or were to take under the will; that if one daughter only was designated, she would take under the will in tail; but if more than one was designated, they would take under the will as tenants in common for life, with remainder to their respective children as tenants in common in tail, with cross remainders between them (the children of the appointed daughters) in tail; such cross remainders to take place as well with regard to the shares of their respective mothers as with regard to the shares of their aunts, in the event of a failure of issue of any of the aunts.

such daughters, as to their mother's shares in tail; and on failure of such issue of any one or more of such daughters, with cross remainders to the others of their issue: and for and in default of such appointment, and of any appointment not exhausting the whole fee, I give and devise my estate at *Irchester*, or so much of the fee as shall not be exhausted by any appointment or appointments made as aforesaid, to my daughter, *Barbara Cockayne Medlycott*, for life; with remainder to all her daughters for their lives, with cross remainders for life between them;—with remainder, during the lives of all the said daughters of my said daughter *Barbara*, and the life of the survivor, to support contingent remainders: and for default of issue of any or either of the daughters now living of my said daughter *Barbara*, I give the said estate to my said daughter *Barbara* and her heirs.

"I give all my real estate, except that at *Irchester*, to my said daughter *Barbara*, for her life, exclusive of her present or any future husband; with all and singular the same powers of appointment and disposition, rights and estates, as before given to her, over, in, or after the remainder of my *Irchester* estate, in default of issue of my said grand-daughter, *Ann Maunsell*: and I do declare that the profits of my said real estate last devised shall go to the several persons successively, to and in trust for whom they are authorized to be appointed.

"I give all my personal estate to my said trustees *J. W. Bramston* and *John Jortin*, whom I appoint executors of this my will; in trust, to retain thereout for their own respective use, the sum of 200*l.* a-piece, for their trouble in executing the trusts of this my will, and to apply all the residue thereof, or so much as shall be necessary, in or towards the payment of all my debts; and the surplus, if any, to invest in real estates, and settle the same to the use of the same person or persons respectively, as should be entitled by this my will to the residue of all my real estates, except that at

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Irchester; and in case my personal estate should be deficient to pay all my debts and legacies, and the costs of executing the trusts thereof, then to raise the deficiency by sale or mortgage of a sufficient part of my real estate, except that at *Irchester*; and I do hereby declare, that the entirety of all my copyhold estates whatsoever, are included in the above devise of all my real estate, except that at *Irchester*, whether surrendered or not surrendered to the use of my will. Lastly, in case the equitable or beneficial interest of, in, or to all or any part of my real or personal estate, after payment of my debts and legacies, and the costs of executing the trusts of my will, is not already disposed of, or should eventually, during my life or afterwards, become not disposed of, I give the same to my said trustees and their heirs, in trust for my said daughter *Barbara Cockayne Medlycott*, to and for her sole and separate use, exclusive of her present or any future husband as aforesaid."

The testator died on the 21st *February*, 1808, leaving his grand-daughters, *Ann Maunsell*, daughter of his eldest daughter, (who died in the testator's life-time) and his daughter, the plaintiff, *B. C. Medlycott*, his co-heiresses at law. *Ann Maunsell* is since dead, unmarried, and intestate, leaving *B. C. Medlycott* her heir-at-law. At the date of the testator's will, and at the time of his decease, the plaintiff had ten children living, all daughters, one of whom is since dead, of full age, but unmarried. The nine others, all of full age, are, first, *Matilda Sophia*, now the wife of *Robert Austen*, LL. D., who has issue seven children, now liying; secondly, *Barbara Maria Cockayne*; thirdly, *Mary Ann*, now the wife of *William Addams*, LL. D., who has issue six children, now living; fourthly, *Georgiana Cockayne*; fifthly, *Sophia Cockayne*; sixthly, *Caroline Eliza*, now the wife of *Thomas Phillip Maunsell*, Esq., who has issue five children; seventhly, *Catherine Cockayne*; eighthly, *Frances*

Annabella, now the wife of *William Assheton*, Esq., but who has no issue; and, ninthly, *Elizabeth Charlotte Cockayne*.

The executors named in the will duly proved it; but *John William Bramston* is since dead, leaving *John Jortin* sole surviving executor. All the married daughters of the plaintiff *B. C. Medlycott*, were unmarried at the death of the testator. The whole of his estate at *Irchester* was freehold;—the copyhold lands were descendible in the same manner as freehold lands at common law.

The questions for the opinion of the Court were,

First, What estate the plaintiff, *Barbara Cockayne Medlycott* has in the freehold and copyhold lands of the testator respectively?

Secondly, Whether the daughters now living of the plaintiff, *B. C. Medlycott*, respectively, have any, and what estate in the testator's freehold and copyhold lands respectively?

Thirdly, Whether the grand-children of the plaintiff, *B. C. Medlycott*, or any and which of them, have any and what estate in the said testator's freehold and copyhold lands respectively? and

Fourthly, Whether the plaintiff, *B. C. Medlycott*, has any and what power of appointment over the testator's freehold and copyhold lands respectively?

The case came on for argument in the course of the last Term.

Mr. Serjt. *Hullock*, for the plaintiff.—It may be perhaps contended, that the purposes of this will will be best answered by giving the plaintiff an estate for life only, with power of nomination or selection among her daughters; but this cannot be done consistently with the rest of the will: and although it is confused in terms, and difficult of construction, the Court must give effect to all the provisions contained in it; from which it is clear that the testator in-

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tended to give the plaintiff an estate for life at all events. But the question next arises, as to what liberty of disposition she had under the words of the whole will, and whether she had not a power of appointment to her children in fee? He contended that she had; for though the words of the first limitation are in themselves indistinct, informal, and almost unintelligible, as the estate at *Irchester* was directed to be appointed to such of her children as she should select; yet, there are other words in the will which distinctly recognize a power of appointing the whole fee; for the testator, after giving the power of appointment in the above form, proceeds thus:—"and for and in default of such appointment, and of any appointment not exhausting the whole fee, I give and devise my estate at *Irchester*, or so much of the fee as shall not be exhausted by any appointment or appointments made as aforesaid, &c." Now, these words must be nugatory, unless the plaintiff has a power of appointing the whole fee. The testator contemplated a power which might exhaust the fee, and therefore he plainly gave a power of appointing to it, so that under these words, the plaintiff may make such appointment. The same power of appointment may be considered to apply to the other real estate, as it might exhaust the fee, although there was no disposition of the remainder in default of appointment, nor any devise to trustees. There is no decision precisely applicable to the present case; but in *Liefe* v. *Saltingstone* (*a*), and *Dighton* v. *Tomlinson* (*b*), it is laid down, that where there is an express estate for life given by will, with liberty to give the fee to particular persons, the devisee shall take for life, with a power to appoint the estate to the objects designated. So, it is said, that where an estate is given absolutely, without any prior limited interest, to such uses as a person should appoint, it would be an estate in fee.

(*a*) 1 Mod. 189.——(*b*) 1 Com. Rep. 194.

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Whiskon v. *Clayton* (a). But where an estate for life is not expressly given, but the estate is bequeathed generally to the devisee, to such uses as he shall appoint at his will and pleasure; nevertheless, restraining the disposition to particular objects, it seems doubtful whether the devisee will take a fee-simple conditional, or an estate in fee upon trust, or an estate for life, with a power to dispose of the inheritance. *Sugden on Powers* (b). As to the estate which the trustees took under this will, it extends no further than the life of Miss *Maunsell*, the grand-daughter of the testator. The legal fee passed out of them at her death, and therefore vests, as disposed of by the will. But even supposing the legal estate to vest in the trustees, the power of appointment in fee might still subsist, notwithstanding such estate. It is consequently immaterial to determine what estate the trustees took; because, if they had an estate in fee, the uses would be executed either before or after the appointment made, and their interest cannot be made to extend beyond the uses for which it was created. Taking, therefore, the whole of the will together, it is impossible to give it effect, as such, without giving the plaintiff an estate for life, with a power of appointing in fee.

Mr. Serjt. *Lens*, for the plaintiff's daughters, submitted, that it was not at all necessary, as to their interest, to determine what estate the trustees took under the words of the will, as that question was not left to the Court.—All the daughters take an estate tail; for if they take only estates for life, then the provision for an indefinite failure of issue in the daughters cannot take effect. The words of the will are, "and for default of issue of any or either of the daughters now living of my said daughter *Barbara*, I give the said estate to my said daughter *Barbara*, and her heirs." And this provision, which is in the second clause of the will, pro-

(a) Leon. 156.——(b) 2nd edit. 97.

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viding for the case if no appointment were made, is corroborated by the first limitation, and with the estates intended to be given under the power. The testator's intention is best collected from taking those two clauses together. In the first, the words " with remainder to any such one or more of the children of such my said daughter (*B. C. Medlycott*), as my said daughter shall appoint, for their lives; with remainder to all and every the child and children of such daughter or daughters, &c.; and if only one be appointed, then to her and the heirs of her body, &c." seem to point distinctly to an appointment of an estate tail. Then, the subsequent limitation to the daughters, gives an estate tail to them, in default of appointment. Taking therefore, the meaning of both limitations together, it seems hardly to admit of a doubt but that the testator intended that the plaintiff's daughters should take an estate tail. If she made no appointment, they must of necessity take such an estate.

Mr. Serjt. *Blosset*, for the plaintiff's grand-children, contended,

First, That the trustees took an estate in fee for the general purposes of the will, *viz.* either for sale, or for supporting contingent remainders throughout.

Secondly, That the power of appointment given to the plaintiff does not enable her to carve out any particular estate, but simply to select and designate the particular persons who are to take.

Thirdly, That these particular estates are not estates tail in the daughters, but they only take life estates, and the granddaughters take in tail.

As to the first point.—The devise in the beginning of the will, gives an estate in fee to the trustees. The general import of the words there made use of, extends over the whole of the instrument, to answer all its purposes, and to appoint all contingent remainders, without naming trustees, and therefore these words must be connected with the prior es-

tate to them. All further questions as to the estates to be taken under this will, must relate to equitable estates only, and not to legal estates.

As to the power of appointment, the plaintiff's discretion extends only to designate the persons, but not the estates they are to take respectively. These are determined by the words of the will creating that power, and they restrain a particular interest to the appointees. The words "and for and in default of such appointment, and of any appointment not exhausting the whole fee, I give and devise my estate at *Irchester*, or so much of the fee as shall not be exhausted, &c." do not imply a power of exhausting the whole fee. The power is as to the real estates to be appointed, or those words would be made to raise by implication, a power in contradiction to it; but when an estate is given in express terms, no different estate can be raised by any implication whatsoever. The Court will not therefore raise an implied estate to overset all the express estates given by the words of this power, and will therefore restrain the appointment to those express estates.

But there is a more decisive answer to this part of the case. The testator did not use the words alluded to, in the manner now contended for by the plaintiff; nor could he do so; because the limitations to be appointed are themselves an exhaustion of the whole fee. The truth is, that by the words "not exhausting the whole fee, &c." and those which follow, "or so much of the fee as shall not be exhausted, &c." he merely meant the undisposed part of the estate; as if, for instance, the plaintiff were to make an appointment of one-tenth, these words would take effect as to the other nine-tenths, and they would then be disposed of under the ulterior limitation.

As to the third point.—The testator gave an estate for life to the plaintiff's daughters, and an estate tail to the grand-daughters. The words "to any such one or more of the children of such my said daughter as my said daughter shall

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appoint, for their lives; with remainder to all and every the child and children of such daughter or daughters, to be appointed, &c. and if only one be appointed, then to her and the heirs of her body; and if more than one be appointed, then all of them (meaning the children of the appointees) to take their mothers' shares, *per stirpes*, &c. with cross remainders between them, &c." cannot apply to an estate tail in the present daughters of the plaintiff. The second clause of the will distributes the same estate to the object of the testator's bounty in default of appointment; it is therefore probable, that he intended them to take the same quantity of estate under the power of appointment, with a discretion only in the plaintiff as to the persons who were to take in that designated quantity of interest, which was to be the same in both cases. There is a further repugnancy to an estate tail in the daughters; for, by virtue of the cross remainders among them, they must be all dead before any of the limitations to the grand-daughters can take effect: they therefore take an estate for life only. The words "*per stirpes*" in the will, give the grand-daughters an estate by purchase, as tenants in common, and this is quite inconsistent with an estate tail in the daughters.

Mr. Serjt. *Hullock*, in reply.—The legal estate in fee is not in the trustees. Wherever an estate is given to trustees, their legal estate is only commensurate with the uses for which it was created, and cannot extend beyond them. The object of the appointment of trustees, was merely to prevent the testator's grand-daughter from putting an end to all the subsequent limitations by him, or otherwise. Then, at her death without issue, all these purposes were fully effected, and the estate of the trustees was at an end. There are no contingent remainders afterwards. The clause in the second limitation which relates to contingent remainders, does not state what those remainders were, nor are there any. The plaintiff, therefore, has a power of appointing in fee;

and has further an estate for her life, and if the fee is not in the trustees, it must vest in her. As to the extent of the power of appointment, the words "and of any appointment not exhausting the whole fee, &c." must in common parlance mean the quantity of interest in the estate, and not the land itself. This is the only legal construction which can be put upon them. The plaintiff has therefore an estate for life, with a power of appointing in fee; and in default of appointment, she has an estate for life, with remainder to her daughters, either for life, in tail, or in fee, as the Court shall determine upon the construction of that part of the will.

Cur. adv. vult.

The following certificate was afterwards sent:—

This case has been argued before us by counsel. We have considered it, and are of opinion,

First, that the plaintiff, *Barbara Cockayne Medlycott*, has in the freehold and copyhold lands of the testator respectively, an estate for her life, with an ultimate reversion to herself in fee.

Secondly, that in default of appointment, the daughters now living of the plaintiff, *B.C.Medlycott*, have respectively, in the freehold and copyhold lands of the testator, estates for life, in remainder, as tenants in common, with cross remainders amongst themselves for life, with remainders to themselves in tail respectively.

Thirdly, that in default of appointment, the grand-children of the plaintiff, *B. C. Medlycott*, have no estate in the testator's freehold and copyhold lands.

Fourthly, that the plaintiff, *B. C. Medlycott*, has power by appointment, to designate which one, or more than one of her daughters is or are to take under the will; that if one daughter only is designated, she will take under the will in

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tail; but if more daughters than one are designated, they will take under the will as tenants in common for life, with remainder to their respective children, as tenants in common in tail; with cross remainders between them (the children of the appointed daughters) in tail; such cross remainders to take place, as well with regard to the shares of their respective mothers as with regard to the shares of their aunts, in the event of a failure of issue of any of the aunts.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

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Between ELIZABETH MURTHWAITE, JOHN MACPHERSON, and CHARLOTTE his Wife, FRANCIS LIND, and JOHN HUDSON MAY, Plaintiffs;

and

The Honorable CHARLES CECIL COPE JENKINSON, the Honorable HENRY KING, the Reverend JOHN CUTHBERTSON, MARIA BARNARD, ALEXANDER HUME EVELYN, JOHN BYDE, GEORGE BARNARD CHARLES MURTHWAITE, and HENRY WOODCOCK, Defendants;

And between GEORGE BARNARD, an Infant, by FREDERICK AUGUSTUS BARNARD, his Grandfather and next Friend, Plaintiff;

and

ELIZABETH MURTHWAITE, JOHN MACPHERSON, and CHARLOTTE his Wife, MARIA BARNARD, FRANCIS LIND, JOHN HUDSON MAY, JOHN CUTHBERTSON, CHARLES MURTHWAITE, ALEXANDER EVELYN, JOHN BYDE, HENRY WOODCOCK, the Honorable CHARLES CECIL COPE JENKINSON, the Honorable HENRY KING, and the Reverend JOHN MITCHELL, Defendants.

Devise to three trustees, of all the testator's freehold, leasehold, copyhold, and personal estate, in trust, after payment of legacies and annuities, which annuities he directed to be paid out of bank stock standing in his name, to pay all the rents, issues, profits, and produce of the residue of his estate and effects, as well real as personal, to his three nieces, *E. M.* and *C.*, share and share alike, for their lives, and after their decease, or either of them, that their lawful issue should have his or her mother's share of such rents, &c. for life; and if either of the nieces should die in the life-time of the others or other of them having no issue, the share of her or them so dying, to be equally divided between the survivors of his nieces for their respective lives, and afterwards by the issue of the survivors of such nieces:—and in like manner if all his nieces, and their issue, save one, should die without issue, then such one to have the whole for her life; and after her decease, the issue of such niece, if more than one, to enjoy the whole, share and share alike; and if but one, such one to enjoy the whole alone; to hold such parts as were freehold to them and each of them, their heirs and assigns as tenants in common, and not as joint tenants; and if but one, to such only one, his or her heirs and assigns for ever; and in case of all

A CASE, of which the following is the substance, was sent by the direction of the Vice Chancellor for the opinion of the Judges of this Court:—

Thomas Murthwaite, being seised in fee of freehold and copyhold tenements; and being also possessed of several

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leasehold estates for years, and of other personal estate, by his last will and testament, bearing date the 29th *December*, 1806, and which was duly executed and attested, so as to pass freehold estates:—after directing that all his debts, funeral charges, and expences of proving his will might be paid;—gave, devised, and bequeathed to Mrs. *Margaret Murthwaite*, Mr. *John Cuthbertson*, and Mr. *John Janes*, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, all and every his freehold, copyhold, and leasehold estates, and all his personal estate and effects whatsoever; in trust, to pay thereout the several legacies and annuities in his will specifically mentioned, and by him given and bequeathed; all which annuities, he thereby willed, ordered, and directed should be chargeable upon and payable out of his 26,400*l.* 3 *per cent.* consolidated bank annuities, or such sum as might be standing in that fund in his name, at the time of his decease; and that the said several annuities should commence from and immediately after his decease.—Then followed several bequests and legacies: all which he directed might be paid as soon as conveniently might be after his decease:—all the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of his estate and effects

all the nieces dying without issue, the whole to go to the devisor's next male heir of his name, to hold to him his heirs and executors in like manner.

The niece *M.* married *G. B.* who died, leaving his wife and one son surviving; *C.* also married but had no issue.

Two of the trustees died, and a considerable surplus of the testator's personal estate remained after paying debts, legacies, and annuities:—Held, first, that the surviving trustee had the legal estate in fee simple devised to the three trustees. Secondly, that the nieces took no legal estate in the freehold tenements. Thirdly, that the son of *G. B.* took no legal estate therein, nor would he at the death of the survivor of the three nieces. Fourthly, that if the devise had commenced with the words "all the rents, issues, and profits," and the passage before these words had been omitted, the three nieces would respectively have taken estates for life in the freehold tenements under the will; with cross remainders between them for life, in the event of one or two of them dying without issue; and lastly, that *G. B.* would, in the events as they then stood, have an estate tail in remainder in his mother's one undivided third part of the said freehold tenements, subject to be divested in part by the birth of other children of his mother, whether sons or daughters; and that he would have an estate tail in the whole of the freehold tenements, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born.

whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which he should die seised or possessed of, interested in, or any way entitled to, at the time of his decease, he gave, devised, and bequeathed unto his three nieces *Elizabeth Murthwaite*, *Maria Murthwaite*, and *Charlotte Murthwaite*, daughters of his late brother the Reverend *Peter Murthwaite*, equally to be divided between them, share and share alike, for and during the term of their respective natural lives, subject nevertheless to such provision and disposition as was thereinafter provided, touching and concerning the house and premises then in his occupation, with the furniture, plate, jewels, books, linen, and implements of household then therein, and his carriage and horses. And from and after the decease of them, or either of them, he declared it to be his will and meaning, that the lawful issue of them, and each of them, should have and enjoy his or her mother's share of all such residue of such rents, issues, dividends, and profits for life, in like manner. And it was his further will and meaning, that if either of his said nieces should happen to die in the life-time of the others or other of them, without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid, should go to and be shared and divided equally between the survivors of his said nieces, for their respective lives, and afterwards by the lawful issue of the survivors of his said nieces in like manner: and if all his said nieces and their issue, save one, should die without issue, lawfully begotten, then he declared it to be his will and meaning, that such surviving niece should have and enjoy the whole of the rents, issues, dividends, interest and profits of such residue and remainder of his estate and effects, for and during the term of her natural life; and from and after her decease, he expressed that it was his further will and meaning, and he thereby willed, ordered, and directed, that the lawful issue of such surviving niece, if more than one, should have and enjoy the whole of the rents, issues, divi-

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dends, interest and profits of all such residue of his estate and effects equally between them, share and share alike:—And if but one, then that such only one should have and enjoy the whole of such part thereof as was personal, to and for his or her own use and benefit; and to hold so much, and such part and parts thereof as were freehold to them, and each of them, if more than one, their, or his or her heirs and assigns, as tenants in common, and not as joint tenants; and if but one, then to such only one, his or her heirs and assigns, for ever; and to hold so much and such parts thereof as was and were copyhold, at the will of the lord or lords, lady or ladies of the manor or manors, of which the same were holden, in like manner:—And that if all his said nieces should die without issue, then, from and after the decease of the survivor of them his said nieces without issue as aforesaid, he thereby gave, devised, and bequeathed the whole of such residue and remainder of his estate and effects, as well real as personal, and as well freehold as copyhold, to his next male heir of the name of *Murthwaite*, to hold to such male heir, his heirs, executors, and administrators in manner aforesaid. He then directed that if the said *Margaret Murthwaite* and his three nieces might not agree to live together after his death, that the lease of his house, his furniture, plate and carriage, should be sold by the trustees, and the money arising therefrom be equally divided between the said *Margaret Murthwaite* and his said three nieces.

The testator died on the 23rd *November*, 1808, without having revoked or altered his will, and leaving his said three nieces, the plaintiff *Elizabeth Murthwaite*, the defendant *Maria Barnard*, then *Maria Murthwaite*, and the plaintiff, *Charlotte Macpherson*, then *Charlotte Murthwaite*, and *Margaret Murthwaite*, *John Cuthbertson*, and *John Janes*, him surviving; and the testator left his said three nieces his heirs at law, and likewise his customary heirs.

Margaret Murthwaite and *John Janes*, alone proved the will of the testator.

Maria Barnard, then *Maria Murthwaite*, some time in the year 1809, intermarried with *George Barnard*, who died on the 8th *October*, 1817, leaving *Maria*, his wife, surviving; and there was issue of the said marriage between them, only one child, *viz. George Barnard*.

In the year 1814, *Charlotte Macpherson*, then *Charlotte Murthwaite*, intermarried with *John Macpherson*, but they have at present no issue of their marriage.

John Janes, one of the executors and trustees of the testator, died in 1814, leaving *Margaret Murthwaite* and *John Cuthbertson* his co-trustees, him surviving; and the said *Margaret Murthwaite* died some time in 1816, intestate, leaving the said *John Cuthbertson*, and also her said daughters, *Elizabeth Murthwaite*, *Maria Barnard*, and *Charlotte Macpherson*, surviving her.

A very large surplus of the testator's personal estate and effects remained, after paying his funeral and testamentary expences, and his debts, and the legacies and annuities bequeathed by him.

The defendant, *Charles Murthwaite*, would now be the next male heir of the said testator of the name of *Murthwaite*, in case the said *Elizabeth Murthwaite*, *Charlotte Macpherson*, and *Maria Barnard*, were now dead, without leaving issue.

The questions for the opinion of the Court were,

First, What estate and interest the said *John Cuthbertson*, the surviving trustee, now has under the said will of the testator, in the freehold tenements devised to the said *Margaret Murthwaite*, *John Cuthbertson*, and *John Janes* as aforesaid?

Secondly, What estates the said testator's three nieces, *Elizabeth Murthwaite*, *Maria Barnard*, and *Charlotte Macpherson*, respectively took under the said will of the said testator, in the said freehold tenements?

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Thirdly, Whether the said *George Barnard* now has any, and what estate in the said freehold tenements, and what estate he will have in the freehold tenements, in case he shall be the only issue of the three nieces living at the death of the survivor of them, no other issue having been born?

In case the Court should be of opinion, that by the will as above stated, the whole legal estate in fee simple in the freehold tenements, is now vested in *John Cuthbertson*, then in case the will had commenced with the words, "all the rents," &c. and the passage before those words had been omitted,

Fourthly, What estates the said testator's said three nieces, *Elizabeth Murthwaite*, *Maria Barnard*, and *Charlotte Macpherson*, would respectively have taken under the said will of the testator in the said freehold tenements? and,

Fifthly, Whether the said *George Barnard* would now have any, and what estate in the said freehold tenements; and what estate he would have in the freehold tenements, in case he shall be the only issue of the three nieces living at the death of the survivor of them, no other issue having been born?

The case came on for argument in the course of the last Term, when

Mr. Serjt. *Hullock*, for the plaintiffs, *Elizabeth Murthwaite*, and *Macpherson* and wife, submitted, that the three nieces of the testator took estates tail in the freehold and copyhold estates, as tenants in common, with cross remainders; and in the leasehold and personal estates, absolutely in thirds:—otherwise, the general intent of the testator, as manifested throughout the whole of the will, could not be fulfilled. As to the interest they took in the freehold and copyhold estates, it will depend entirely on the construction of the word "*issue*," the question being, whether that word was intended to be made use of by the testator in its ex-

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tensive, indefinite, and general sense, or to be confined to their immediate children, and whether the limitations beyond the issue are so expressed, with respect to his intention to make these further limitations dependent on a failure of issue generally, or on a failure of issue of the three nieces at their respective deaths. The testator's general intent appears to be, that all the issue of his nieces should take, and that the property should not be confined to their children only, and that all such issue should be extinct before it should go over. If the nieces had children, who might all happen to die during the lives of their mothers, leaving offspring children, such grand-children would be excluded. But this was evidently not the meaning of the testator; and yet this would be the consequence, if the words "issue," and "the time of failure," should be construed in their restrictive sense, as it would reduce the interest of the nieces to tenants for life, both in the real and personal estate. In the case of *King* v. *Melling* (*a*), Lord *Hale* said, that "the word 'issue' is *nomen collectivum*, and takes in the whole generation, *ex vi termini*." But though the Courts have decided, that the words, "if the legatee shall die without issue, then over," even in bequests of leasehold and personal property, of themselves signified a dying without issue living at the death of the first taker, yet, the more modern cases agree, that they are not to be so understood, but on the contrary, that they shall be intended to mean an indefinite failure of issue, unless the contrary appear from other circumstances in the will. This is evident from the case of Lord *Beauclerk* v. *Dormer* (*b*), where the testator made *D.* his sole heir and executrix, and if she died without issue, then to go to *G. B.*:—Lord *Hardwicke* held, that no authority came up to support the point, that *ex vi termini*, such a limitation of a personal estate should be confined to a dying without issue living at

(*a*) 1 Vent. 229. S. C. Fearne on Contingent Remainders, 7th edit. 150.——(*b*) 2 Atk. 306.

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the time of the death of the first taker, and that as the limitation was general, and un restrained by any circumstances in the will, the limitation over was void. So, in *Saltern* v. *Saltern* (*a*), his Lordship was of the same opinion, and said, that "where there is a devise of a lease for years to a man, and if he die without issue, remainder over; there is no doubt but the whole interest vests in the first taker." In *The Attorney-General* v. *Hird* (*b*), the same distinction was taken by Lord *Thurlow*. In *Doe*, d. *Ellis* v. *Ellis* (*c*), where there was a devise of land to the testator's son *Joseph*, his heirs and assigns for ever; but in case his son should die without issue, then over; it was held, that *Joseph* took an estate tail; and Lord *Ellenborough* there said (*d*), "the general rule is clear, that the words, 'in case my said son *Joseph* shall die without issue, must be construed to mean a general failure of issue; and that according to the opinion of Lord *Thurlow* in *Bigge* v. *Bensley* (*e*), the general words are to be varied only by circumstances arising upon fair demonstration: that his Lordship there observed, that there were not less than fifty-seven cases upon this point, and that to call dying without leaving issue the natural sense of dying without issue, was against all the cases." In *Tenny*, d. *Agar* v. *Agar* (*f*), Mr. Justice *Le Blanc* said, "there is no case where the words 'die without leaving issue,' simply have been adjudged to mean without leaving issue at the time of the death."

The same doctrine is laid down by Lord *Eldon*, in *Crooke* v. *De Vandes* (*g*), and the principles contained in the judgment in that case are particularly applicable to the present.

In *Barlow* v. *Salter* (*h*), it is stated, that "although in the limitation of a personal estate after a dying without issue, those words shall not *ex vi termini*, and without the concurrence of any other circumstance of intention, signify a

(*a*) 2 Atk. 376.——(*b*) 1 Bro. Cha. Cas. 170.——(*c*) 9 East, 382.——(*d*) Id. 386.——(*e*) 1 Bro. Cha. Cas. 190.——(*f*) 12 East, 261. (*g*) 9 Ves. 203.——(*h*) 17 Ves. 481.

dying without issue then living, even though the limitation is in the nature of an estate tail by implication only; yet, on the other hand, they shall not *ex vi termini*, when there is any other circumstance of intention, import an indefinite failure of issue, even though the limitation is in the nature of an express estate tail, but that, in either case, the signification of these words may be confined to a dying without issue then living, by any clause or circumstance in the will which can indicate or imply such intention." Here, the words are general, and there is no clause contained in the will to shew that it was the intention of the testator to have confined his meaning to a dying without issue at the time of the death.—In *Forth* v. *Chapman* (*a*), where a testator gave all the residue of his real and personal estate to his nephews, *A.* and *B.*, and if either of them should die, and leave no issue of their respective bodies, then he gave the said premises to *C.*—Lord Chancellor *Parker* observed (*b*), that "the devise carried a freehold as well as a leasehold estate;" nevertheless, he thought it might be reasonable enough to take the same words in two different senses as to the two different estates; and that as to the freehold, the construction should be, if *A.* or *B.* died without issue generally; by which there might be at any time a failure of issue; and that with respect to the leasehold, that the same words should be intended to signify their dying without leaving issue *at their death*." But the distinction there taken between real and personal estate was doubted by Lord *Kenyon*, in *Porter* v. *Bradley* (*c*), who considered the words *leaving issue*, as having a confined relation to the time of the death of the parent, in the cases of both real and personal estate. The authority of Lord *Eldon*, however, in *Crooke* v. *De Vandes*, is decidedly in favour of the distinction taken in *Forth* v. *Chapman*. In *Roe*, d. *Dodson* v. *Grew* (*d*), where the testator devised lands to his nephew for life, and after his death to the use of the issue male of his body lawfully be-

(*a*) 1 Peere Wms. 663.——(*b*) Id. 667.——(*c*) 3 Term Rep. 146. (*d*) 2 Wils. 322.

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gotten, and the heirs male of the body of such issue male; and for want of such issue male, remainder over; and the devisee had no issue at the time: it was held, that he took an estate tail. Hence, the object of the testator here was to give each of his nieces an estate for life, and that it should not go over without a general and indefinite failure of their issue. There, too, it was decided, that the intention of the testator was to be followed, provided it did not clash with the rules of law; and that where there appears a particular intent, and a general intent, the latter must prevail. In *Denn*, d. *Webb* v. *Puckey*, Lord *Kenyon* said (*a*), that "it had been for a long time, and very properly, settled, that if a devisor, ignorant of technical terms, sitting down to draw his own will, make clashing limitations, the Courts, in construing that will, must depart from some particular limitations, in order to give effect to the general intention of the devisor." In *King* v. *Burchall*, Lord Keeper *Henley* said (*b*), that "there can be no technical words in a will, but that they are to be construed according to the intention of the parties; and that every word ought to stand, if consistent with the manifest intention." In *Robinson* v. *Robinson* the Court inserted in their certificate to the Chancellor (*c*), that "the devisee took an estate in tail male, to effectuate the manifest general intent of the testator." So, here, upon the true construction of the will, the testator's nieces must in necessary implication be considered to take estates tail with cross remainders.—The only remaining question then is, what estate the trustees took. It is quite clear they took no legal estate in the freehold or copyhold; for where an estate is devised to *A.*, in trust for *B.*, to take the rents and profits, the estate is vested in *B.*, as *cestui que trust*. By the limitations in the will, the realty became vested in the nieces, by the statute of uses. The trustees could take no larger interest than to answer the purposes of the will, and although they might have had a legal estate until the legacies

(*a*) 5 Term Rep. 303.——(*b*) Amb. 379. S. C. 4 Term Rep. 297, (n.)——(*c*) 1 Burr. 52.

and annuitants were paid, still, the annuities were directed to be satisfied out of the testator's stock in the bank annuities, and no charges were imposed on his real estate; and it appears that a surplus of his personal estate remained after those legacies and annuities were paid. In *Brooke's Abridgment* (*a*), it is said, that where a man makes a feoffment in fee to his use for the term of his life, and that after his decease, *J. H.* shall take the profits; that makes a use in *J. H.*... But that it is otherwise, if he said that after his death his feoffees should take the profits, and deliver them to *J. H.*; for that does not make the use in *J. H.*, for he had them only through the hands of the feoffees. In *Broughton* v. *Langley* (*b*), where one devised lands to trustees and their heirs, to the intent to permit *A.* to receive the rents and profits for his life, and after his decease the trustees were to stand seised of the premises to the use of the heirs of the body of *A.*, remainder over; Lord Chief Justice *Holt* said, that "this would have been a plain trust at common law, and what at common law was a trust of a freehold or inheritance is executed by the statute, which mentions the word *trust* as well as *use*." In *Shapland* v. *Smith* (*c*), where there was a devise of lands to trustees, upon trust that they should yearly, out of the rents and profits, after deducting rates, taxes, and repairs, pay the residue to *C. S.*, and his assigns for life, after his decease to the use of the heirs male of the body of *C. S.*, and in default of *such issue*, remainder over: Lord *Thurlow* expressed his opinion that the trustees being to pay the taxes and repairs, must have an interest in the premises, and therefore that the legal estate for the life of *C. S.* was in them. In *Kenrick* v. *Lord Beauclerk* (*d*), where a testator devised his real and personal estate to trustees, to the intent that they might dispose of his personal estate in discharge of

(*a*) Tit. Feoffment, pl. 52.——(*b*) 2 Salk. 679, S.C. 2 Ld. Raym. 873.
(*c*) 1 Bro. Cha. Cas. 75.——(*d*) 3 Bos. & Pul. 175.

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his debts, and such legacies as he might direct, and as to his real estates, subject to his debts, and such charges as he might make, he devised the same to *I. S.* for life: it was held, that under this devise the legal estate in the realty vested in *I. S.* for life, and that the trustees took no estate therein. In *Doe*, d. *Leicester* v. *Briggs* (*a*), where there was a devise in trust, for the trustees to pay unto or else permit and suffer the testator's niece to receive the rents, the legal estate was held to be vested in her. In *Right*, d. *Phillipps* v. *Smith* (*b*), there was a devise of freehold and leasehold estate to trustees, on trust to permit and suffer the testator's wife to receive and take the rents and profits, until his son should attain twenty-one; it was determined that the legal estate was vested in the wife, and was not affected by a subsequent leasing proviso, given to the trustees, which was confined to premises originally vested in them as trustees, or over which, they afterwards retained a power of sale. On these grounds, therefore, it is perfectly clear that the trustees took no legal estate in the realty, but that the testator's nieces took estates tail therein, with cross remainders.

Mr. Serjt. *Blosset*, for *George Barnard* (the infant) contended, first, that an equitable estate in fee passed to the trustees; secondly, that the nieces took estates for life, with remainder to their issue in tail, with cross remainders between them; and, thirdly, that *George Barnard* took a vested remainder in tail in his mother's share, subject to be divested in part, by after-born issue of his mother, and a contingent remainder in the shares of the two other nieces, who were his aunts. First, the trustees took an estate in fee under the bequest made to them; for all the testator's freehold and other estates were vested in them, to pay thereout the several legacies and annuities specifically mentioned in the will, as well as for other purposes therein also speci-

(*a*) 2 Taunt. 109.——(*b*) 12 East, 455.

fied. Although it has been found that his personal estate was sufficient to satisfy the legacies and annuities bequeathed, still, it does not appear whether the government stock, from which the latter was to be satisfied, was in existence or not. The mere appropriation of that fund for that purpose, would not prevent the trustees from disposing of the real estate, and more particularly so, if it should turn out that it was insufficient to discharge the annuities in question, which required a continuance of the estate until they were satisfied. They must also take a legal estate to support contingent remainders arising in the will. The legal estate in fee therefore, is vested in them, and the equitable only, in the devisees.—Secondly, the nieces took only estates for life, as it is expressly limited to them by the terms of the will. In the first place, there is a devise of the residue of the testator's estate to his three nieces, in equal shares for their lives; and after the decease of either of them, their lawful issue are to enjoy the mother's share in like manner; this must mean the immediate children of the nieces only, or on lawful issue living at the time of their death; and in general default of issue, the interest of each of the nieces is controlled to an estate for life, and the word "issue" is distinctly used by the testator in that sense. This is apparent from the general intention expressed by the testator in the latter clause of the will, which negatives the idea of his giving them an estate tail; as he has expressly directed, that "if his nieces should die without issue, the whole of the residue was to go over to his next male heir." The word "issue" in primary acceptation, is either a word of purchase or of limitation. So, the devise to the lawful issue of the nieces, "in like manner" must mean that they were entitled to take share and share alike, and on the same terms as the devise was made to the nieces in the first instance. It has been urged, however, that the term "issue" must be taken as a *nomen collectivum*, and embracing all the issue, to the utmost extent of the family; but the testator did not mean to use it as a

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word of inheritance, but that all the issue of his nieces, whether sons or daughters, should enjoy collectively; for he directed, that "the lawful issue of the surviving niece (if more than one) should have the residue of the estate divided equally between them, share and share alike." It is perfectly clear that the testator did not mean that the heir at law should take till the whole of the issue of his nieces was exhausted; and if so, the words "for life," as applied to the issue, must be altogether rejected, and they must take in tail. Here, therefore, *George Barnard* took a vested remainder in tail in his mother's share of the estates, and a contingent remainder subject to the interest of his two aunts.

Mr. Serjt. *Peake*, for *Maria Barnard*, the other niece, observed, that he was unable to add any weight to the argument adduced by Mr. Serjt. *Hullock*, in support of her taking an estate tail.

Mr. Serjt. *Hullock*, in reply.—From the general construction of the whole of the will, it is quite clear that the legal estate in the real property of which the testator died seised, is not vested in the trustees. Although his property in the funds might not be adequate to pay the legacies and annuities, the realty could not be chargeable. If there were no personal assets, the legacies would lapse, and the real estate can only be made chargeable to the payment of them by express words. At all events, the personal property was primarily liable, and which was more than sufficient to satisfy both the legacies and annuities. Although by the former part of the devise, the nieces took only an estate for life, still, the main object and general intent of the testator was, that it should not go over, till the failure of issue generally by them, and that it should not be confined to such children only as might be living at the time of their deaths; and the case of *Robinson* v. *Robinson* is decisive as to this point.

Cur. adv. vult.

The following certificate was afterwards sent:—

This case has been argued before us by counsel. We have considered it, and are of opinion,

First, That *John Cuthbertson*, the surviving trustee, now has the legal estate in fee simple in the freehold tenements, devised by the will of the testator to *Margaret Murthwaite*, the said *John Cuthbertson*, and *John Janes*.

Secondly, That consequently, the testator's three nieces, *Elizabeth Murthwaite*, *Maria Barnard*, and *Charlotte Macpherson*, took no legal estate under the said will, in the said freehold tenements.

Thirdly, That the said *George Barnard* has now no legal estate in the said freehold tenements, and will have none at the death of the survivor of the three nieces.

Fourthly, That if the will had commenced with the words "all the rents," &c. and the passage before those words had been omitted, the testator's three nieces would respectively have taken under the will in the said freehold tenements, estates for life, with cross remainders between them for life, in the event of one or two of them dying without lawful issue; and,

Fifthly, That the said *George Barnard* would now have an estate in tail in remainder, in his mother's one undivided third part of the said freehold tenements, subject to be divested in part, by the birth of other children of his mother, whether sons or daughters; and that he would have an estate in tail, in the whole of the said freehold tenements, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

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An assignment by deed to trustees, of all the income, emoluments, and profits, which during the life of the assignor, and his continuing to hold the office of clerk of the peace for *Westminster* should arise or become due to him as such clerk in respect of his office (after deducting the salary or allowance of his deputy for the time being), upon trust, to pay interest, which should become due to *A.* and *B.* on certain debts due from the assignor to them, and from time to time render and pay the surplus and residue of the income, emoluments, and profits to the assignor, after satisfying the trusts, is not a good or effectual assignment, nor valid in law; and the trustees are not entitled to receive such income and profits under such assignment.

BY a decree of the Vice Chancellor, made on the hearing of this cause on the 3d *June*, 1820, it was ordered, that a case, of which the following is the substance, should be stated for the opinion of the Judges of this Court:

Thomas Wright Vaughan, Esq. one of the defendants, as clerk of the peace for the city and liberty of *Westminster*, which office he has held since the year 1802, under the appointment of the *custos rotulorum* of the said city, liberty, and county, and from the time of his appointment, has executed the said office by his deputy Mr. *Lorenzo Stable*, an attorney-at-law, residing within the said city and liberty, by indenture bearing date the 25th *January*, 1806, made between the said *T. W. Vaughan* of the first part, *Thomas Baylis*, Esq. *George Jackson*, Esq. and *Samuel Ridge*, Gent. of the second, and *George Palmer*, Gent. and *William Loaden*, Gent. of the third part:—reciting, amongst other things, that there was then due from the said *T. W. Vaughan* to the said *Thomas Baylis* the sum of 1587*l.*; to the said *George Jackson* 1153*l.* 11*s.*; and to the said *Samuel Ridge* 779*l.* 15*s.*; and also reciting that the said *T. W. Vaughan* was clerk of the peace for the city of *Westminster*; and that being at that time unable to pay the said before-mentioned sums of money, he had requested the said *Baylis*, *Jackson*, and *Ridge* to give him time for payment of their said several debts, until the expiration of twelve calendar months next after the de-

cease of *T. Vaughan* his father; and that in order to induce *Baylis*, *Jackson*, and *Ridge*, to comply with the said request, the said *T. W. Vaughan* had offered to secure the payment of the said several debts at the expiration of the said time next after the decease of his father, with interest for the same, at the rate of 5 *per cent. per annum*, by the covenant of him the said *T. W. Vaughan*, and also by an assignment of the income and profits of the said place of clerk of the peace for *Westminster*, unto the said *G. Palmer* and *W. Loaden*, their executors, &c. with such power of attorney for receiving the same as thereinafter was contained, upon the trusts thereinafter declared concerning the same. And reciting that *Baylis*, *Jackson*, and *Ridge*, having taken the said request into consideration, had agreed to comply with the same, and that *Jackson*, at the request of the said *T. W. Vaughan*, had agreed to postpone the payment of all the interest which might become due on his aforesaid debt of 1153*l.* 11*s.* until the expiration of the said term of twelve calendar months next after the decease of the said *T. Vaughan*:—It was witnessed, that in pursuance and part performance of the said proposal of the said *T. W. Vaughan*, he covenanted with the said *G. Palmer* and *W. Loaden*, that he the said *T. W. Vaughan*, his heirs, executors, or administrators, would, at or before the expiration of twelve calendar months next, after the decease of the said *T. Vaughan*, pay to *Baylis* and *Ridge* respectively, or their respective executors, &c. the said sums of 1587*l.* and 779*l.* 15*s.* and would in the mean time pay them interest after the rate of 5*l. per cent. per annum*, computed from the day of the date of the indenture, by equal half-yearly payments; and would, at or before the expiration of twelve calendar months next after the decease of the said *T. Vaughan*, pay to the said *G. Jackson*, his executors, &c. the said sum of 1153*l.* 11*s.* with interest for the same, after the rate aforesaid, from the day of the date of the indenture. And it was by that indenture further witnessed, that in pursuance and further performance of the said proposal on the

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part of the said *T. W. Vaughan*; and in consideration of ten shillings, he the said *T. W. Vaughan*, at the request and by direction of the several persons parties thereto of the second part, and so far as he lawfully could or might, did bargain, sell, assign, transfer, and set over unto the said *G. Palmer* and *W. Loaden*, their executors, administrators, and assigns, all and singular the income, emoluments, produce, and profits whatsoever, which during the life of him the said *T. W. Vaughan*, and his continuing to hold the said place or office of clerk of the peace for *Westminster*, should accrue or become due or payable to him the said *T. W. Vaughan* as clerk of the peace for *Westminster*, or otherwise, by reason or in respect of his said place or office, and all arrears thereof, then due, after deducting the salary or allowance of the deputy for the time being, of him the said *T. W. Vaughan*, in the said office, and all other expences attending the execution of the said office:—To hold, receive and take the said income, emoluments, produce, and profits, and all and singular other the premises thereby assigned, thenceforth unto the said *G. Palmer* and *W. Loaden*, their executors, administrators and assigns, upon trust, that the said *G. Palmer*, and *W. Loaden*, and the survivor of them, his executors, administrators and assigns, should in the first place, by and out of the same, retain, deduct, and reimburse themselves and himself, certain costs and expences therein particularly mentioned, and all such costs, charges, and expences as they or any of them should have incurred, or become liable to pay, in or about the execution of the aforesaid trusts. And should and would, in the next place, pay and apply the same in or towards payment and discharge of the interest which from time to time should become due or owing to the said *T. Baylis* and *S. Ridge* respectively, on their said several and respective debts according to the intent and meaning of the covenant thereinbefore in that behalf contained. And should from time to time render and pay all the surplus and residue of the said income, emoluments, produce, and

profits which should from time to time remain, after answering and satisfying the trusts and purposes aforesaid, unto the said *T. W. Vaughan*, his executors, administrators, or assigns, for his or their proper use and benefit. And for the considerations aforesaid, and for the better enabling the said *G. Palmer* and *W. Loaden*, their executors, &c. to recover and receive the said income, emoluments, produce and profits therein before thereby assigned or intended so to be, the said *T. W. Vaughan* did make, nominate, and appoint the said *G. Palmer* and *W. Loaden*, and the survivor of them, his executors, &c. his attornies and attorney, in the name of him the said *T. W. Vaughan*, to ask, recover, and receive the said income, emoluments, produce, and profits thereinbefore assigned, or intended so to be, and every or any parts thereof, of and from the persons liable to pay the same, and in default of payment thereof to sue forth and prosecute any action or suit, or to use such other ways or means for enforcing payments of the same, which to the said *G. Palmer* and *W. Loaden* should seem meet, and to give receipts and discharges for the same. And the said *T. W. Vaughan* did thereby covenant that his executors, &c. should not, nor would, at any time thereafter, by himself or themselves, or by any agent or agents, receive or take into his or their possession, the said income, emoluments, produce, and profits, or any part thereof, or revoke or make void the powers and authorities therein before contained, or any of them, or do any act whereby the said *G. Palmer* and *W. Loaden* should be in anywise hindered or obstructed from receiving or recovering the same income, &c.

The questions for the opinion of the Court were—

Whether the assignment of the income, emoluments, produce and profits of the office or place of clerk of the peace for *Westminster*, after deducting the salary or allowance of the deputy for the time being, of the defendant *T. W. Vaughan*, in the said office, by the said defendant *T. W. Vaughan* to the plaintiffs, *G. Palmer* and *W. Loaden*, by the inden-

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ture, dated the 25th *January*, 1806, is a good and effectual assignment, and valid in the law?

And whether the said *G. Palmer* and *W. Loaden* could legally and of right receive and take the income, profits, emoluments and produce of the said place or office, under, and according to the true intent, meaning and effect of the said deed of assignment, upon and subject to the trusts, intents and purposes therein expressed and declared, of and concerning the same?

The case came on for argument, in the course of the last Term, when

Mr. Serjt. *Lawes*, for the plaintiffs, submitted, that the assignment in question was valid. That there was no authority expressly in point, although there have been some decisions with respect to the sale of offices of different descriptions. The deed is legal on the face of it, as it is founded on a good consideration, namely, an antecedent debt, and is also grounded on policy and reason. It cannot be contended that the office is not one of trust, as well as of a public nature, and that it touches and relates to the execution and administration of justice; or that it is saleable, and does not fall within the meaning of the 2d and 3d sections of the statute 5 & 6 *Edw.* 6. *c.* 16 (*a*): but the assignment

(*a*) By which it is enacted, that "if any person bargain or sell any office, or deputation of any office, or any part of them, or receive or take any money or other profit, or take any promise, agreement, covenant, bond, or assurance, to receive or have any money or profit for any office or deputation, or any part of them, or to the intent that any person should have any office or deputation, or any part of them, which office shall in anywise touch or concern the administration or execution of justice, or the receipt of any of the king's revenue, or which shall concern any clerkship in any court of record, wherein justice is to be ministered; every such person that shall bargain or sell any of the said offices or deputations, or that shall take any money or profit, &c., shall not only lose all his right and estate in the office, or the gift or nomination of the office, but also such person that shall give any money, or make any promise or assurance for the offices, &c., shall be adjudged a disabled person to have and enjoy the said office, &c." And by the third section it is further enacted, that "all such bargains, agreements, and assurances, shall be void."

in question does not embrace the whole of the profits resulting from the office, but only so much as from time to time remain, after fully satisfying the salary of the deputy, and all other expences attending the execution of the office. It is necessary in the first place, to consider the nature of its creation, as well as the rights and duties attached to it. It is regulated by the statute 37 *Hen.* 8. *c.* 1. *s.* 3. (*a*), and 1 *Will. & Mary*, stat. 1. *c.* 21. *s.* 5. (*b*), by the first of which, the *custos rotulorum* is authorized to appoint clerks of the peace, and by the latter, it is required that they should be resident in the county of which they are appointed, but in both these statutes it is expressly provided, that the offices may be exercised by deputy. [Mr. Justice *Burrough*. By the 37 *Hen.* 8, the deputy must be instructed in the laws, and admitted or approved of by the *custos rotulorum*.] In the case of *The Queen* v. *The Clerk of the Peace of Cumberland* (*c*), it was decided, that the office of the clerk of the peace is a freehold; and in *The King and Queen* v. *Evans* (*d*), it was determined that he could not be removed but for a misdemeanor. So, in *Harcourt* v. *Fox* (*e*), it was held, that he was not even removeable by a succeeding *custos rotulorum*;—on the ground that he had a freehold in his office. A clerk of the peace may therefore assign or

(*a*) By which it is enacted, that "every *custos rotulorum* shall appoint clerks of the peace, and grant the office to such able person instructed in the laws as shall be able to exercise the same, to hold the same during the time that the *custos rotulorum* shall exercise the office of *custos rotulorum*, so that the said clerk demean him in the office justly; and it shall be lawful to every such grantee of the said clerkship to occupy the office, by himself or by his deputy instructed in the laws, so that the deputy be admitted by the *custos rotulorum*."

(*b*) By which it is enacted, that "the *custos rotulorum*, or other person to whom it shall belong to appoint the clerk of the peace, shall, where the office of clerk of the peace shall be void, nominate a sufficient person residing in the county or place, to exercise the same by himself or his sufficient deputy, for so long time as such clerk of the peace shall well demean himself in his office."

(*c*) 11 Mod. 80.——(*d*) 12 Mod. 13.——(*e*) Ld. 42.

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dispose of the profits of such office, and more particularly so, if part of them be reserved to defray the expences of it, and satisfy the salary of the deputy. The fulfilment of the duties of the office by deputy, being expressly provided for, it cannot be said that public justice will suffer from the assignment of such profits. Here, it appears that the deputy was approved of, and no inconvenience could result from the assignment, if he did not faithfully execute the duties of his office. The case of *Godolphin* v. *Tudor* (*a*), recognizes the right of a principal to dispose of the profits of a public office; for it was there decided, that where an office is within the statute 5 & 6 *Edw.* 6, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good. So, if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is equally good. It appears in this case, that the salary of the deputy was to be deducted in the first instance. In *Stuart* v. *Tucker* (*b*), it was resolved, that though a military officer's half pay is not assignable at law, yet the use of it may be assigned in equity; and that when it is so assigned the assignor cannot maintain *assumpsit* for it, as money had and received to his use. There are several other cases where deputies have not been appointed, in which it has been decided, that either officers in the army, or under government, may assign the use of the pay resulting from their respective situations. Here, the deputy was fully competent to fulfil the duties of the office, and his salary was to be provided for out of the profits. The assignment of the residue, therefore, is immaterial, as it can have no tendency to interrupt the administration of justice. Ecclesiastical persons having freeholds, may assign over the profits of their benefices, subject only to make a provision for their curates. That bears

(*a*) 1 Salk. 468. 3 Salk. 251. S. C. 6 Mod. 234.——(*b*) 2 Sir Wm. Blac. 1137.

a strong analogy to the present case, as, by the terms of the deed, the salary of the deputy was to be provided for in the first instance.

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Mr. Serjt. *Lens*, contrà.—The provision in the deed as to the salary of the deputy is wholly beside the present question, nor does it turn on the fact, whether the clerk of the peace had such deputy or not. It might be as well contended, that a person filling the situation of recorder, might appoint a deputy, as the office of clerk of the peace equally concerns the administration and execution of justice. It has been admitted in the argument for the plaintiffs, that it is not saleable, and it follows as a matter of course, that it cannot be pledged indefinitely; or, in other terms, that the party holding it must be altogether restrained from assigning it. The assignment in question is tantamount to a sale, and whether a deputy had been appointed or not, it is the duty of the principal to see that the office be properly executed, and not barter or pledge it for any sum that might be offered him. If he cannot sell, neither can he transfer the profits to a trustee for his use, but here he assigned all the profits which might arise to him in respect of his office, after deducting the salary of his deputy for the time being, for the purpose of paying certain debts before owing by him. The office, therefore, is substantially no longer his, but rests in those persons to whom its produce is assigned. If the deputy were to become insolvent, there would be no person to perform the duties of the office, and consequently there would be a hinderance of public justice. So, if he were to die, the trustees, to whom the profits were assigned, could not act, neither could they sell them for any price. The deed therefore is void for want of consideration. Independently of this, however, sales of offices of this description are expressly prohibited by statute, and by the policy of the law it is extended to assignments also, for in the cases of

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Flarty v. *Odlum* (*a*), *Lidderdale* v. *The Duke of Montrose* (*b*), and *Barwick* v. *Reade* (*c*), it was expressly determined, that neither the full nor future half pay of a military officer, was the subject of sale, or assignable at law; but that such officer must retain the substance of the situation he fills, as well as the form. The analogy attempted to be drawn between this case and those of ecclesiastical benefices does not apply, as they stand on wholly different grounds. The making provision for the cure is not applicable to a salary to be paid to a deputy for executing an office. The writ of execution applicable only to ecclesiastics, is given when the sheriff, upon a common writ of execution sued out, returns that the defendant is a beneficed clerk, not having any lay fee; in which case, a writ goes to the bishop of the diocese, in the nature of a *levari facias*, to levy the debt and damages *de bonis ecclesiasticis*, which are not to be touched by lay hands; and thereupon the bishop appoints sequestrators, and sufficient being reserved to serve the cure, the remainder is taken under the execution (*d*). The case of *Godolphin* v. *Tudor* is not in point, as it merely turned on the mode of paying the deputy; and the distinction was there drawn, that if a deputy gave a bond to pay a certain sum out of the profits, it was good; but that it was void where it was given without relation to such profits. Here, the principal remained as the ostensible possessor of the office of which he was to receive the profits, which, in point of substance, he has sold, although he has retained the salary of his deputy, for the performance of the duties of such office. Although the cases of *The Queen* v. *The Clerk of the Peace of Cumberland*, *The King & Queen* v. *Evans*, and *Harcourt* v. *Fox*, have established, that the office of clerk of the peace is a freehold, still they are inapplicable to the present, as the statute 1 *Will. & Mary* only vests such freehold in him, *quamdiu se bene gesserit*. In *Blackford* v. *Preston* (*e*), it

(*a*) 3 Term Rep. 681.——(*b*) 4 Term Rep. 248.——(*c*) 1 Hen. Blac. 627. (*d*) See 3 Blac. Com. 418. Burn's Eccl. Law, tit. Sequestration, vol. iii. Page 317, 4th edit.——(*e*) 8 Term Rep. 89.

was held, that a sale by the owner of the command of a ship employed in the *East India* Company's service, without the knowledge of the Company, was illegal; and Mr. Justice *Lawrence* there said (*a*), that "with regard to offices under government, it had been decided that they could not be sold, though they be not such offices as were mentioned in the statute 5 & 6 *Edw.* 6." In *Osborne* v. *Williams* (*b*), where the owner of a Post Office packet assigned her to his son, and afterwards prevailed on him to let the father take the profits, promising to allow his son 200*l.* *per annum*, by way of salary, as the commander, which agreement was entered into without the privity of the Post-Master-General; and it was agreed in writing, that the father, in consideration of the affection he bore his son, gave up to him all the privileges in the packet, and the son engaged to hire her at a certain rate *per* month, but notwithstanding such agreement, the father continued to receive the profits; the Master of the Rolls held it to be illegal, as being a fraud upon the Post Office, as well as on the provisions of the ship registry acts. So, in *Parsons* v. *Thompson* (*c*), where the defendant, in consideration that the plaintiff, who was master joiner in a dock-yard, would procure himself to be superannuated, undertook, in case he should succeed the plaintiff as master joiner in such yard, to allow him the extra pay from the yard books; the agreement having been made without the knowledge of the Navy Board, to whom the appointment belonged, was holden void, on the ground that it was contrary to public policy. So also, in *Garforth* v. *Fearon* (*d*), where *A.*, through the interest of *B.*, was appointed to the office of customer of *Carlisle*, having previously signed an agreement, declaring that his name was made use of in trust for *B.*, and that he would appoint such deputies as *B.* should nominate, and would empower *B.* to receive the fees of the office to his own use; such agreement was held void. In *Harrington* v. *Klop-*

(*a*) 8 Term Rep. 94.——(*b*) 18 Ves. 379.——(*c*) 1 Hen. Blac. 328.
(*d*) Id. 327.

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rogge (*a*), it was decided, that an agreement for the assignment of all offices was good as to all offices which might legally be assigned. There, however, the profits arising from the office were only those of a private secretary, which the defendant held, and which he assigned to the plaintiff by

(*a*) Sir JAMES HARRINGTON, Bart. *v.* KLOPROGGE, Esq.

K. B. Michaelmas Term, 25 Geo. 3.

An assignment of the profits of all offices which the defendant might acquire, is good as to all those which may be legally assigned. The office of private secretary does not fall within the meaning of the statute 5 & 6 *Edw.* 6.

THE plaintiff declared in debt on a common money bond, dated the 24th *December*, 1771, from the defendant to the plaintiff, in the penal sum of 1200*l.* The defendant craved oyer of the bond and condition, which was as follows:—"Whereas, in and by a certain bond or obligation in writing, bearing date the 18th *December* instant, the above bound defendant, together with the above bound plaintiff, did become jointly and severally bound unto *T. Newman*, of the city of *London*, in the penal sum of 1200*l.*, with a condition thereunder written, that if the defendant and plaintiff, or either of them, their or either of their heirs, executors, or administrators, did and should well and truly pay, or cause to be paid to *Newman*, his executors, administrators, and assigns, one annuity or yearly sum of 100*l.*, by quarterly payments, on the days and times, and in manner therein mentioned, for and during the natural life of the defendant, then the said bond was to be void:—And whereas, for the better securing the payment of the said annuity, the above bounden defendant, together with the plaintiff, did enter into and execute a warrant of attorney, bearing even date with the said bond, empowering certain attornies therein named, to confess judgment against them, in an action of debt on the said recited bond, at the suit of *Newman*, in his Majesty's court of King's Bench, in manner therein mentioned, for the said sum of 1200*l.*, besides the costs of suit, as in and by the said recited bond and warrant of attorney, reference being thereunto respectively had, may more fully appear:—And whereas the plaintiff entered into and executed the said recited bond and warrant of attorney, at the special instance and request of the defendant; and the defendant received the whole consideration-money, which was given and paid for granting the said annuity of 100*l.* to *Newman*, his executors, administrators and assigns, as aforesaid, and the plaintiff received no part thereof, except 150*l.* which the defendant deposited in the hands of the plaintiff, for the purpose of paying the said annuity so far as the same would extend:—And whereas the defendant, in order to indemnify the plaintiff, his executors, administrators, and assigns, from the payment of the said annuity, had agreed, when and so soon as the defendant should become possessed of and entitled unto any commission, post, place, salary, pension, or pay whatsoever, that then he the defendant should and would immediately execute a proper assignment thereof, and fully and effectually authorize and empower the plaintiff, his executors, administrators, and assigns, to receive and take the whole fees, profits, and emoluments thereof; and in the mean time, and until such event should happen, that he the defendant should and would from time to time pay unto the plaintiff, his executors, administrators or assigns, all such sum and

way of indemnifying him on account of money paid by him for the defendant, and which therefore did not fall within the meaning of the statute 5 & 6 *Edw.* 6. Here, no distinction can be drawn between a sale, mortgage, or assignment; besides, the office of clerk of the peace is an office touching the administration of justice, and by the assignment in question, the defendant parted with all the interest and advan-

sums of money as he should receive by means or on account of his being private secretary to the Earl of *Holdernesse*:—Now,—the condition of this obligation is such, that if the above bounden defendant shall and do, immediately upon his becoming possessed of or entitled unto any commission, post, place, salary, pension, or pay whatsoever, execute a proper assignment thereof unto the plaintiff, his executors, administrators, or assigns, and fully and effectually authorize and empower him and them to receive and take the whole fees, profits, and emoluments thereof, as the same shall become due and payable; and in the mean time, and until such event shall happen, if he the defendant shall and do, from time to time, pay into the hands of the plaintiff, his executors, administrators, or assigns, all such sum and sums of money whatsoever, as he the defendant shall or may receive, by means or on account of his being such secretary to the said Earl of *Holdernesse*, as aforesaid; and also, if he the defendant, his heirs, executors, or administrators, shall and do, in and by all things, save, defend, keep harmless and indemnified, the plaintiff, and his heirs, executors, and administrators, and every of them, and his, their, and every of their lands and tenements, goods and chattels, of, from, and against the payment of the said annuity of 100*l.*, in the condition of the said recited bond mentioned as aforesaid, and all arrears thereof; and also of, from, and against all and all manner of actions, suits, loss, costs, charges, demands, and expences whatsoever, which he the plaintiff, his heirs, executors, or administrators, or any of them, shall bear, pay, lay out, suffer, sustain, or be put unto, for or by reason or on account of any non-payment of the said annuity, or any part thereof, or for or by reason, or on account of the plaintiff's having entered into and executed the said recited bond and warrant of attorney as aforesaid, or either of them, or any matter or thing in them, or either of them, contained, or in any manner relating thereto, then this obligation to be void, or else to remain in full force and virtue:—Which being read and heard, the defendant said, that the plaintiff ought not to have or maintain his aforesaid action against him the defendant, because he said, that he the defendant, for a certain space of time from and after the making of the said bond, to wit, from thence until and upon the 24th *December*, 1772, and no longer, continued private secretary to the Earl of *Holdernesse*, and that he the defendant had not at any time since the making of the bond, become possessed of or entitled unto any commission, post, place, salary, pension, or pay whatsoever; and that he the defendant, during the whole time that he continued private secretary to the said Earl of *Holdernesse*, did, from time to time, pay into the hands of the plaintiff all such sum and sums of money whatso-

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tage he was to derive from it, to his trustees, and must be therefore now considered as a mere nominal possessor. Both the principal and deputy must be in existence at the same time; and if the latter be removed, it is the duty of the former, as principal, to supply another with all the requisites and qualifications of the first. Besides, it must be

ever, as he the defendant did or might receive by means or on account of his being such secretary to the said Earl of *Holdernesse*, as aforesaid; and also that he the defendant had continually, from the making of the said writing obligatory, hitherto, in and by all things saved, defended, kept harmless, and indemnified the plaintiff, and his lands and tenements, goods and chattels, of, from, and against the payment of the said annuity of 100*l*., in the condition of the said recited bond mentioned as aforesaid, and all arrears thereof; and also of, from, and against all, and all manner of actions, suits, loss, costs, charges, damages, and expences whatsoever, which he the plaintiff had hitherto borne, paid, laid out, suffered, sustained, or been put unto, for or by reason or on account of any non-payment of the said annuity, or any part thereof, or for or by reason or on account of the plaintiff's having entered into and executed the said recited bond and warrant of attorney, as aforesaid, or either of them, or any matter or thing in them, or either of them contained, or in any manner relating thereto, according to the tenor of the said condition of the said bond or writing obligatory, to wit, at, &c. And this, &c. Replication—That the plaintiff ought not to be precluded from having and maintaining his aforesaid action against the defendant, because he said, that he the defendant, whilst he so continued private secretary to the said Earl of *Holdernesse*, as in the said plea mentioned, to wit, on the 23rd *December*, 1772, at, &c. aforesaid, received divers large sums of money, to wit, the sum of 500*l*., by means and on account of his being such secretary as aforesaid, yet the defendant did not pay the last-mentioned sum of money, or any part thereof, into the hands of the plaintiff, but altogether neglected and refused so to do, and still doth refuse, contrary to the form and effect of the condition of the said writing obligatory, in the declaration mentioned; and this the plaintiff prayed might be enquired of by the country; and the defendant did the like, &c.—And the plaintiff, according to the form of the statute in such case made and provided, further said, that he the plaintiff, since the making of the said writing obligatory, in the declaration mentioned, and before the exhibiting the bill of the plaintiff, that is to say, on, &c. at, &c. aforesaid, was obliged to pay, and did pay, to *Newman*, in the said plea mentioned, a large sum of money, to wit, the sum of 1000*l*., in discharge of the arrears of the said annuity, or yearly sum of 100*l*., in the said plea mentioned, then due and payable to *Newman*, whereof the defendant afterwards, to wit, on, &c. at, &c. had notice; yet the defendant (although often requested), had not at any time hitherto re-paid to the plaintiff the last-mentioned sum so paid by him, in discharge of the arrears of the annuity as aforesaid, or any part thereof, nor had he in any manner whatsoever saved, defended, kept harmless, and indemnified the

presumed, that the legislature would not unnecessarily squander the public money, and they therefore intended that the emoluments to be given to a clerk of the peace should be only commensurate with the nature of his office, which cannot be legally assigned or transferred to another.

Mr. Serjt. *Lawes*, in reply.—The case of *Godolphin* v. *Tudor* is expressly in point to shew that a principal in an office has a right to dispose of the profits of such office. He may either give them to his deputy, or assign them to a creditor. Here, however, there has not been an assignment of all the emoluments and profits of the office. If there had been, it would be bad on account of public policy; but only such profits were assigned as should arise after deducting the salary of the deputy for the time being; and it is found as a fact, that such deputy was duly nominated and appointed. The office has never been unoccupied, and it does not appear but that the deputy has always properly discharged the duties relative to it. In case of his illness or death, such duties would devolve on the principal, but during his life he was to be properly provided for. The nature of the office, therefore, remains as it was before the

plaintiff from and against the payment of the same, but had altogether neglected and refused so to do; and the plaintiff still remained undefended, and not in anywise saved or kept harmless, or indemnified therefrom, or from any part thereof, to wit, at, &c. aforesaid, contrary to the form and effect of the condition of the said writing obligatory, in the declaration mentioned, in that behalf made as aforesaid. And this, &c.

To this the defendant demurred; and the plaintiff joined in demurrer.

Mr. *Morgan*, in support of the demurrer, made two objections as to the validity of the agreement. First, that it was illegal and void by the stat. 5 & 6 *Edw.* 6. *c.* 16., as it was made for the purpose of assigning all offices; and that it was an assignment of an office of trust; and, secondly, that such office could not be assigned by common law.

But Lord *Mansfield* observed, that there was nothing in the objections; that the agreement was for the assignment of all offices, and that the condition of the bond was good as to all offices which might legally be assigned; that the profits arising from the office of private secretary might be assigned; and as to all others, that they did not fall within the present case.

Judgment for the plaintiff.

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assignment, and the duties of it are still capable of being exercised either by the principal or his deputy.

Lord Chief Justice DALLAS.—What is the nature of the office of clerk of the peace in the eye of the law? He is to receive a salary commensurate with his duty. If his deputy becomes ill, the principal must perform the duties of the office himself; but how can he do so, if there be nothing to sustain him? So, if the deputy were to die, how could the duties of the office be performed? At present, I have no doubt but that the assignment in question is invalid.

Mr. Justice PARK.—If the deputy should die, there would be nothing left to pay the principal, as he has assigned all the profits which might arise to him during his continuance in office; and if the *custos rotulorum* refused to approve the nomination of another deputy, how could the duties of the office be executed? The case of *Stuart* v. *Tucker* has been shaken by subsequent decisions, in which a distinction has been taken between the assignment of an equitable or legal estate. In *Barwick* v. *Reade* (*a*), it was held, that the full pay of a military officer was not assignable by way of annuity; and the Court there, when the motion was made, intimated a very clear opinion, that such an assignment was illegal, it being contrary to the policy of the law, that a stipend given to one man for future services should be transferred to another who could not perform them. So, in *Flarty* v. *Odlum* (*b*), it was determined, that the half-pay of a military officer was not the subject of sale, and that creditors under the Lords' Act, could not compel him to include it in his schedule; and in the subsequent case of *Arbuckle* v. *Cowtan* (*c*), this Court held, that the profits of an ecclesiastical benefice did not pass to the assignees under an insolvent act, though included in the

(*a*) 1 Hen. Blac. 627.——(*b*) 3 Term Rep. 681.——(*c*) 3 Bos. & Pul. 321.

schedule of the insolvent; and Lord *Alvanley*, in delivering the judgment of the Court, said (*a*), "it is now clearly established, that the half-pay of an officer is not assignable, and unquestionably any salary paid for the performance of a public duty ought not to be perverted to other uses than those for which it is intended. Notwithstanding the case of *Stuart* v. *Tucker*, in which it was held that the half-pay of an officer was assignable in equity, it was expressly decided, in *Flarty* v. *Odlum*, that it was not assignable at all, which decision met with general approbation."

Cur. adv. vult.

The following certificate was afterwards sent to the Vice-Chancellor:—

This case has been argued before us by counsel. We have considered it, and are of opinion, that the assignment of the income, emoluments, produce, and profits of the office or place of clerk of the peace for *Westminster*, after deducting the salary or allowance of the deputy for the time being, of the defendant, *Thomas Wright Vaughan*, in the said office, by the said defendant, *Thomas Wright Vaughan*, to the plaintiffs, *George Palmer* and *William Loaden*, by the indenture in the pleadings mentioned, dated the 25th *January*, 1806, is not a good or effectual assignment, nor valid in law:—And that the said *George Palmer* and *William Loaden*, are not entitled legally and of right to receive and take the income, profits, emoluments, and produce of the said place or office, under and according to the true intent, meaning, and effect of the said deed of assignment, upon and subject to the trusts, intents, and purposes therein expressed and declared of and concerning the same.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

(*a*) 3 Bos. & Pul. 328.

1821.

Friday, June 22.

Baxter's Bail.

Notice of bail residing "at *Leeds*," is too general, although the bail had been found to be resident there; but the Court allowed time to amend the notice, and make further enquiry as to the sufficiency of the bail.

Mr. Serjt. *Vaughan* objected to the justification of one of the bail by affidavit in this cause, on the ground that he was described in the notice as of *Leeds* generally, which he contended was an insufficient and indefinite description.

Mr. Serjt. *Hullock*, contrà, insisted, that the objection was ill founded, as the bail was a *Portuguese*, of the name of *Lopes Joze de Grada*, and it appeared by affidavit, that he had been found to be residing in the parish of *Hurslet*, within the township of *Leeds*.

Lord Chief Justice Dallas.—In a notice to justify bail, the description of the parties should be accurate, as well as the exact place of their residence. If bail live within a large town, a party is not to be put to the expence and inconvenience of seeking him out. Although the description be defective, if the bail be found, the plaintiff may derive all the information he sought to obtain; and it appears in this case, that the bail was found to reside within the township of *Leeds*.

But the Court gave ten days time to amend the description in the notice, and make further enquiry as to the sufficiency of the bail (*a*).

(*a*) As to the insufficiency in notices of bail, of the description of bail residing in large towns,—see *Jackson*'s Bail, 1 Chit. Rep. 492; *Taylor*'s Bail, Id. 503; *King*'s Bail, 2 Chit. Rep. 81.

1821.

HAMILTON *v.* SCHOFIELD.

Friday, June 22.

The defendant having suffered judgment by default, in an action brought against him on bills of exchange, sued out a writ of error, after a rule to compute principal and interest:—Held, that the plaintiff could not take out execution, without some express declaration, either by the defendant or his attorney, that the writ of error was brought for delay, although the defendant had acknowledged the debt to be due before and since the commencement of the action.

THIS was an action of *assumpsit* brought against the defendant as the acceptor of three several bills of exchange. He suffered judgment by default, and after a rule to refer it to the prothonotary to compute principal and interest, he served the plaintiff with the allowance of a writ of error.

Mr. Serjt. *Hullock* now moved for a rule *nisi*, that the plaintiff might be allowed to take out execution, notwithstanding such writ, on an affidavit, stating that the defendant's sole motive in suing it out was for the purpose of delay, as, previously to the commencement of the action, he had written three letters to the plaintiff, acknowledging the debt, and requesting time for payment of the bills, as well as another letter of the same import, after the action was brought. The learned Serjeant submitted, that those letters raised a sufficient inference that the writ of error was brought for delay, and that there could be no error on the record, as the defendant had suffered judgment by default; and he cited the case of *Box* v. *Bennett* (*a*), where the Court laid it down as a general rule, that they would in no case stay proceedings, or set aside an execution, on account of a writ of error being brought on a judgment of nonsuit, which evidently must be for the purpose of delay and vexation. The same principle is applicable to a judgment by default.

But, *Per Curiam*.—It is a strict rule in the King's Bench, as well as in this Court, that proceedings cannot be stayed pending a writ of error, unless there be an express declaration by the defendant, or his attorney, that it was brought for

(*a*) 1 Hen. Blac. 432.

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HAMILTON v. SCHOFIELD.

delay. The letters written by the defendant are a mere acknowledgment that he was indebted to the plaintiff, and nothing more, and do not deprive him of his writ of error. Besides, there may be error on the record, as the bills might have been made payable at a particular place, and the averment of presentment there might have been omitted in the declaration.

The learned Serjeant, therefore, took nothing by his motion.

Saturday, June 23.

ALLEN, Demandant; HEXLEY, Tenant; MASSEY, Vouchee.

The Court will not allow a recovery to be amended, by transposing the names of the demandant and tenant, unless the documents relative to its being suffered, be produced.

MR. Serjt. *Hullock*, in the last Term, applied to amend this recovery, which was suffered in *Hilary* Term 40 *Geo.* 3., by transposing the names of the demandant and tenant;—on an affidavit which stated, that it was the intention of the parties that *Hexley* should have been the demandant, and *Allen* tenant, and that the mistake had only been lately discovered. He relied on the case of *Roberts*, Demandant; *Robinson*, Tenant (*a*), where a similar application had been granted.

But the Court directed enquiry to be made as to whether the same mistake was made in the warrant of attorney, and other documents.

The learned Serjeant now renewed his application, on an affidavit which stated, that those instruments could not be found; and he observed, that the Court would presume from the deed to make a tenant to the *præcipe*, that the names had been inserted by mistake.

They, however, refused the amendment.

(*a*) 2 Taunt. 222.

1821.

WILSON *v.* PETO and HUNTER.

Tuesday, June 26.

In an action on the case for obstructing the plaintiff's lights, a clerk who superintended the erection of the building by which they were darkened, and who alone directed the workmen; may be joined as a co-defendant with the original contractor.

THIS was an action on the case, for obstructing the plaintiff's lights.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after the last Term, it appeared that the plaintiff was the occupier of a house adjoining *Furnival's Inn*; that the defendant *Peto* had contracted to pull down the old scite of buildings which formed that inn, and rebuild others on a more extensive scale, and which he had done at a considerable expence; that the defendant *Hunter* acted in the capacity of managing clerk to *Peto*, and superintended the carrying on of the works.—It was also proved, that the plaintiff's son had frequently stated to *Hunter*, during the progress of the work, that his father's windows would be obstructed by the erection of the new building, and that they had actually been so; when it was objected, that *Hunter* ought not to have been joined as a co-defendant in the action, as he merely acted in the character of clerk or superintendent of the workmen, and had no interest in the contract which was entered into by *Peto* alone. His Lordship, however, was of opinion that the action was properly brought against both, and the Jury accordingly found a verdict for the plaintiff.

Mr. Serjt. *Lens* now applied for a rule *nisi*, that this verdict might be set aside and a new trial granted; and in support of the above objection, submitted, that this being an action on the case, for the obstruction of lights, it was distinguishable from trespass or trover; that *Hunter* might be considered as one of the workmen employed under *Peto*; and that there was no evidence to affect him as to the obstruction of the plaintiff's windows.

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WILSON v. PETO.

The mere erection of the buildings was not the act complained of, but the consequences resulting from it. The action, therefore, if maintainable at all, should have been brought against *Peto* alone. In *Stone* v. *Cartwright* (*a*), it was decided, that no action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal; but that the principal or those actually employed are only liable; and Lord *Kenyon* was of opinion, that the action could not be maintained against the defendant, who was the middle man, but that it ought to have been brought either against the person who actually committed the trespass, or concurred therein, or against the superior, for whose benefit the work was carried on. So, here, *Hunter* was merely an intermediate person to superintend the labourers who were hired by *Peto*. The action, therefore, should either have been brought against the workmen committing the injury, or *Peto*, as the principal, for whom the act was done.

Lord Chief Justice DALLAS.—The plaintiff's son told *Hunter* that his father would never assent to the privation he should suffer from the erection of the buildings in question. *Hunter* was the foreman of the works. He attended from day to day, and alone gave all the orders for the purpose of carrying on the buildings. The action was therefore properly brought against him as the manager; and even if it had been brought against him alone, I think the plaintiff would have been entitled to recover. In *Stone* v. *Cartwright*, Lord *Kenyon* said, that (*b*) "in cases of that description, the action must either be brought against the hand committing the injury, or against the owner for whom the act was done." Here, it was under the direction and order of *Hunter* that the buildings were erected, and by which it was proved the plaintiff had received an injury. *Hunter*, therefore, is per-

(*a*) 6 Term Rep. 411.——(*b*) Id. 412.

sonally liable, and *Peto* was merely answerable to pay the labourers under his control and employ.

Mr. Justice PARK.—In *Stone* v. *Cartwright*, the defendant was an intermediate man, and no acts were done under his express directions. But on the evidence adduced at the trial in this cause, the defendant *Hunter* must be considered as liable, as the buildings were carried on under his sole superintendence and management.

Mr. Justice BURROUGH.—The distinction turns between the person employed and the employer. If *Hunter* had not been made a co-defendant with *Peto*, the latter might have called him as a witness to prove his whole case. The Court however, must act on general rules, and if it appeared that he had been wantonly or improperly made a defendant, he might have been released at the trial, but not otherwise. Even if the action had been brought against him alone, the plaintiff might have been entitled to recover, but the Court will not listen to the objection now raised, for they are not bound to do so, *de jure*, but merely as a matter of grace.

Mr. Justice RICHARDSON.—The case of *Stone* v. *Cartwright* was far stronger in favor of the defendant than the present. There, the defendant employed a bailiff under him, and Mr. Justice *Lawrence* said, that "if the plaintiff had given evidence that the defendant had particularly ordered those acts to be done, from whence the damage had ensued, it would have varied the case;" but here, *Hunter* was in constant attendance, and alone gave instructions as to the carrying on the works from day to day, and they were executed under his immediate superintendence and direction.

Rule refused.

1821.

Tuesday, June 26.

MARRYATT, Demandant; ELMORE, Tenant; SHARD, Vouchee.

The Court will not permit a recovery to be amended by increasing the quantity of land, if the deed to lead the uses contains sufficient terms to shew that it was intended to pass; nor is it necessary that the exact admeasurement should be inserted in such deed.

MR. Serjt. *Blosset* moved that this recovery, which was suffered in *Michaelmas* Term, 1774, might be amended, by increasing the quantity of lands, according to the deed to make a tenant to the *præcipe*;—on an affidavit which stated, that *Sir John Shard* had conveyed lands situate in two parishes in the county of *Sussex*, and which he had purchased of one *Stone*, in the year 1730, to his son for life, remainder to his heirs in fee; that the son had conveyed his interest to *Elmore* and his heir, in the largest words, so as to make him a tenant to the *præcipe*, and that, in 1774, the recovery was suffered accordingly; that in the deed to lead the uses, the lands were described as consisting of 360 acres, comprising a farm, called Nunnery House, under which description it had passed ever since; and that in an admeasurement lately made, it was discovered to contain 401 acres; that by indentures of lease and release, in 1802, *Shard* the younger and *Elmore* conveyed the premises to one *Reaston*, and that a recovery was suffered accordingly; but that the heir of *Elmore*, who was tenant to the *præcipe* in the first recovery, did not join with *Shard* in such latter recovery.

The learned Serjeant therefore submitted, that the heir of *Elmore* should have joined in the last recovery, when it was suffered.

But, *per Curiam*.—This appears to be unnecessary. It is a more futile objection than that made in the case of *Collyer* v. *Mason* (*a*). Sufficient appeared in the recovery suffered in 1774, to shew that the estate had been conveyed by *Shard* to *Elmore*;—it was, therefore, unnecessary for his heir to

(*a*) Ante, vol. v. Page 597.

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MARRYATT, Demandant.

join in that suffered in 1802. Although conveyancers may deem it to be necessary, still, the Court will not interfere, nor will they listen to astute objections made on the behalf of purchasers, as to the increasing the quantity of land;—it is unnecessary to go into the actual modern admeasurement, if the deed to lead the uses contains sufficient terms to shew that it was intended to pass; neither is it necessary to have the exact admeasurement in the deed, for general words are sufficient. The amendment in this case, therefore, is unnecessary, although the admeasurement may exceed the quantity of land comprised in the deed.

The learned Serjeant, therefore, took nothing by his motion.

GRIFFITH *v.* CROCKFORD.

Tuesday, June 26.

Where an avowant in replevin carried down the issue to trial without adding the *similiter* to the plea in bar, the Court set aside the verdict for irregularity, but without costs.

THIS was an action of replevin. Avowry for rent in arrear. Plea in bar, concluding to the country. The issue was delivered to the defendant, who returned it without adding the *similiter* to the conclusion of the plea, but merely inserted an &c. The plaintiff's attorney afterwards sent it back to the defendant, who obtained a summons to amend by adding it, which was refused, unless he would accede to certain terms. These, however, the defendant refused to comply with, and carried down the issue, without adding it, although it was done in making up the record; and the Jury found a verdict for him.

Mr. Serjt. *Peake*, in the last Term, obtained a rule *nisi*, that this verdict might be set aside for irregularity, with costs, on the ground that the defendant should have amended the issue, and not carried it down to trial in an

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GRIFFITH v. CROCKFORD.

informal and incomplete state; and that the summons to amend was not taken out a week before the cause was to be tried.

Mr. Serjt. *Taddy* now shewed cause, and cited the case of *Sayer* v. *Pocock* (*a*), where the record was amended after verdict, by adding the words "and the defendant does so likewise," at the end of the replication, on the ground that the omission was the act of the clerk of the papers; and there Lord *Mansfield* said, "one is ashamed and grieved that such objections remain;—they have nothing to do with the justice of the case, but only serve to entangle, without being of the least aid in preventing irregularity." Here, the learned Serjeant contended, that the defendant was led into error by the plaintiff himself.

Mr. Serjt. *Peake*, in support of the rule, submitted, that a *similiter* could not be implied in the &c., added to the conclusion of the plea in bar; that as the issue had been re-delivered by the plaintiff to the defendant, he should have complied with the terms required by the former, and not come down to trial with it in an imperfect state.

The Court made the rule for setting aside the verdict

Absolute, but without costs (*b*).

(*a*) Cowp. 407.———(*b*) See 1 Str. 551. 641. 2 Wms.'s Saund. 319 (a). Tidd's Practice, 7th edit. 931. *Wright* v. *Norton*, 1 Stark. Rep. 400. S. C. 2 Chit. Rep. 25, where a record was allowed to be amended in a *penal action*, after verdict, by inserting a *similiter*, although the objection was taken at the trial.

1821.

HALLER, Demandant; WOOLLEY, Tenant; PALMER, Vouchee.

Thursday, June 28.

MR. Serjt. *Vaughan* moved that this recovery might be amended by substituting the word "advowson" for that of "rectory," on an affidavit that it was the object of the parties that the former should pass, and not a rectory.

A recovery may be amended by substituting an advowson for a rectory, if it appears by the deed to lead the uses, that the former was intended to pass.

By the deed to make a tenant to the *præcipe*, the premises were described as the manor of *Carlton Carlew*, in the county of *Leicester*, together with the site of the manor-house, and the advowson, presentation, free disposition, and right of patronage of and in the rectory of the parish church of *Carlton Carlew*.

Fiat.

MEDLEY *v.* SMITH.

Thursday, June 28.

THIS was an action of replevin, which came on for trial before the Lord Chief Baron at the Spring Assizes at *Hertford*, 1820, and as it embraced a question of considerable importance, relative to the proceedings under a writ of extent, the learned Judge directed the Jury to find a verdict for the plaintiff, with nominal damages, subject to the opinion of this Court, on a special case to be drawn up by the plaintiff, and afterwards settled between the parties.

If a verdict be found for the plaintiff with nominal damages, subject to the opinion of the Court on a special case to be drawn up by the plaintiff; if he refuses to do so, the case cannot be set down for argument, nor can the plaintiff be compelled to complete it; but the defendant may apply to set aside the verdict, and have a new trial.

Mr. Serjt. *Peake*, on a former day in this Term, moved that the case might be set down for argument, on an affidavit which stated, that the plaintiff and his attorney had refused to consent to draw up or settle the case, although the Lord Chief Baron had long since granted his summons for that purpose, and that frequent applications had been made to the plaintiff by the defendant so to do.

1821.

MEDLEY v. SMITH.

But the Court observed, that they could not direct a case to be set down for argument; for instance, if the parties could not agree as to facts, and that the defendant's proper remedy was to apply to set aside the verdict, and Mr. Justice *Park* observed, that Lord *Kenyon*, more than twenty years since, had said, that the Court could not compel a party to draw up a special case.

The learned Serjeant therefore took nothing by his motion, but now moved that the verdict might be set aside, and a new trial had, which the Court granted, on his producing an affidavit of the facts as above stated.

Saturday, June 30.

DOE, on the Demise of SAMPSON, v. ROE. (TEMPLEMAN, Tenant.)

In proceeding in ejectment under the stat. 1 *Geo.* 4. *c.* 87. *s.* 1, the Court, on making a rule absolute (no cause being shewn) for the tenant's undertaking to give the plaintiff judgment, to be entered up against the real defendant, and to enter into a recognizance in *a reasonable sum*, conditioned to pay the costs and damages which should be recovered by the plaintiff in the action;—ordered the tenant to appear in the next succeeding Term, to find such bail as were specified in the former rule, and on no cause being shewn to that order, they directed the rule for entering up judgment for the plaintiff to be made absolute. The Court can only give a reasonable sum for the costs of the action, and not for the mesne profits; the amount of which must be ascertained by the prothonotary.

MR. Serjt. *Hullock*, in the last Term, obtained a rule, calling on *Templeman*, the tenant in possession, to shew cause, why, upon his being admitted defendant, besides entering into the common consent rule, and giving the common undertaking, he should not undertake, in case a verdict should pass for the plaintiff, to give the plaintiff judgment, to be entered up against the real defendant of the Term next preceding the time of trial; and also why he should not enter into a recognizance, by himself, and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which should be recovered by the plaintiff in the action. He founded his motion on the first section of the statute 1 *Geo.* 4. *c.* 87, "An act for enabling landlords more speedily to recover possession of lands and tenements unlawfully held over by tenants." He produced an affidavit

as required by that statute, stating the service of the declaration in ejectment, at the foot of which, in addition to the ordinary notice, was another addressed to the tenant, requiring him to appear on the first day of the next *Easter* Term (being the Term immediately succeeding the notice), in this Court, there to be made defendant, and if ordered by the Court to find such bail, and for such other purposes as were mentioned and provided for by the above statute; and which was signed by the attorney for the landlord, (the lessor of the plaintiff). It was also sworn, that the tenant was in possession under an agreement from year to year, determinable by the landlord on his giving six months' notice to quit. That such notice had been duly given, and that a notice had also been served on the tenant by the landlord's attorney, demanding the possession of the premises to be delivered up to such landlord.

On no cause being shewn, the learned Serjeant, on a subsequent day in the last Term, moved to make the above rule absolute, on affidavit of service of the rule on the tenant, which the Court directed to be done in the whole, and ordered that *Templeman* should peremptorily, on the fifth day of this Term, give such undertakings and find such bail, with such conditions and in such manner as were specified in the above rule in that behalf; and they further ordered that the tenant, on notice of this rule, should shew cause on the sixth day of this Term why, in case he should neglect or refuse to give such undertakings and to find such bail as above specified, an absolute rule should not be made, for entering up judgment for the plaintiff pursuant to the statute.

The Court observed, that they were only empowered to give a reasonable sum for the costs of the action, and not for the mesne profits, and that what was to be considered a reasonable sum must be ascertained by the Prothonotary.

1821.

DOE
v.
ROE.

The learned Serjeant on this day, on an affidavit of the service of the order, and on no cause being shewn, the rule for entering up judgment for the plaintiff was made

Absolute (*a*).

(*a*) In *Doe*, d. *Phillips* v. *Roe*, 5 Barn. & Ald. 766. S. C. 1 Dow. & Ryl. 433, it was determined that a tenancy, by virtue of a demise in writing, of apartments for a period of *three months certain*, was a tenancy "for a term" within the meaning of the statute 1 *Geo.* 4. *c.* 87; that on a rule calling upon the tenant to enter into a recognizance under that statute, it was unnecessary to specify in the rule *nisi* the amount of the security required, as the Court may mould the rule conformably to its requisites, on cause being shewn. But in *Doe*, d. *Bradford* v. *Roe*, 5 Barn. & Ald. 770, it was held, that where a tenant held from year to year, but without a lease or agreement in writing, it was not a case within the statute. So, in *Doe*, d. *Cardigan* v. *Roe*, 1 Dow. & Ryl. 540, it was determined, that the statute did not extend to the case of a lessee holding over, after notice to quit given by himself, where his tenancy had not expired by efflux of time. With respect to the notice to the tenant in possession at the foot of the declaration, it was decided in *Goodtitle*, d. *Duke of Norfolk* v. *Notitle*, 5 Barn. & Ald. 849, that it need not be in the name of the plaintiff, but that if in the name of the lessor of the plaintiff, or even any other person, the Court would permit the rule for judgment against the casual ejector to be drawn up:—although in a MS. note to *Doe*, d. *Phillips* v. *Roe*, 1 Dow. & Ryl. 435, it is stated, that the notice must be signed by the landlord himself, and not by *Richard Roe*, in order to give the landlord the benefit of the statute.

Saturday, June 30.

SUMMERSETT *v.* JARVIS and Another.

A person who purchases dead horses for his dogs, and sells the skins and bones, does not thereby become a trader, although he might sell such skins at a profit. Where a bankrupt was required by his assignees on his last examination, to deliver to them his books of account, which he did:—Held, that he must be deemed to have delivered them on compulsion; and it being afterwards found, that he was not a trader, and that the commission had improperly issued, that he might support an action of trover against such assignees, without any previous demand of the books.

THIS was an action of trover for certain books of account and household furniture. The defendants pleaded, first, Not Guilty;—and secondly, that the plaintiff had brought a former action of trover against the defendants in the Court of King's Bench, in which they had obtained a verdict, and that the grievances and causes of action in this suit men-

tioned, were the same and not other or different causes. The plaintiff added a *similiter* to the first plea, and took issue on the second.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last *Hilary* Term, it appeared that the plaintiff was a farmer residing in *Kent*; that a commission of bankrupt was issued against him on the 1st *March*, 1817, under which he was declared a bankrupt on the 18th, and that the defendants were chosen his assignees; that the plaintiff commenced an action against them in the Court of King's Bench, for the purpose of trying the validity of the commission, which came on for trial before Lord *Ellenborough*, at *Maidstone*, at the Summer Assizes, 1817, when the Jury found a verdict for the defendants; that the plaintiff afterwards obtained a new trial, on the ground of his Lordship's not having admitted evidence which was offered for him; and that the cause was tried a second time at *Maidstone*, at the Summer Assizes, 1818, before Mr. Justice *Abbott*, when the Jury again found a verdict for the defendants.

The trading attempted to be established in all the actions, was the buying of dead and unserviceable horses by the plaintiff, and his selling the skins, bones, and some of the flesh. At the present trial, it was proved for the plaintiff, that he purchased horses for the sustenance of his hounds, of which he kept eight or ten couple, and that his saddler took the skins to work into harness for his teams; that in *March*, 1816, the plaintiff had given notice to the person of whom he principally purchased horses, that he would not have any more, as he was about to part with his dogs. It was also proved, that at the last examination of the plaintiff, before the Commissioners at *Guildhall*, the defendant *Jarvis*, as one of his assignees, demanded his books of account to be delivered to him and the other defendant, as such assignees; on which the plaintiff sent for and delivered them to *Jarvis*, although he had previously refused to do so; but the

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SUMMERSETT v. JARVIS.

plaintiff did not prove that he had made any demand of them from the defendants, before the commencement of this action. For the defendants, it was proved, that the hides and bones of the horses were sold, and that the plaintiff had said, that "his object in buying them was for the resale of the hides, and that if he could get a good price for them, he should make a good thing of it." His Lordship left it to the Jury to say, first, whether the plaintiff ever was a trader, and whether he bought and sold these horses with a view to profit; secondly, whether he committed an act of bankruptcy while he was a trader; and thirdly, whether he had left off trading when the petitioning creditor's debt was incurred, which was in *September*, 1816. The Jury found a verdict for the plaintiff, but liberty was given the defendants to move to set it aside, in case the Court should be of opinion that he was not entitled to recover.

Mr. Serjt. *Taddy*, in the last Term, had accordingly obtained a rule *nisi*, that this verdict might be set aside and a nonsuit entered;—or that a new trial might be granted, on the ground that the verdict was against evidence.

In support of the nonsuit, he submitted, first, that the second plea of the defendants, operated as an estoppel to this action, and that although different articles were stated to have been taken by them in the plaintiff's previous declarations, to those detained in the present, yet, that the grievances were the same in both, as well as the causes of action. The issuing of the commission was the actual cause, which was confirmed by the two former verdicts obtained for the defendants. The authority given by the Commissioners to the assignees, continued from the time of issuing the commission until it was superseded; and the defendants acted as such at the time the books were demanded, and there was no fresh taking by them, but it must be considered as one continuing act. Secondly, that as the commission was not superseded at the time the books were

demanded, and the plaintiff having delivered them to the defendants as assignees, they had a legal right to retain them in their character as such, and as the plaintiff did not dispute that authority when they were delivered, it was not a delivery by compulsion, and as he had not demanded them before the commencement of this action, there was not sufficient proof of a conversion by the defendants. Thirdly, that the verdict was at all events against evidence, the weight of which was most clearly in favour of the defendants; for his Lordship left it to the Jury to say, whether, taking all the circumstances together, it was not a wholesale dealing by the plaintiff; and he observed, that though the flesh of the horses might be given away, still none of the hides were; and that the plaintiff's saying that "it was a very good thing," was a strong circumstance to shew that he bought and sold with a view to profit.

[Lord Chief Justice DALLAS observed, that it appeared at the trial, that the articles for which this action was brought were not the same as those which were sought to be recovered in the two former, and that the books in question formed no subject of those actions, and that it had been referred to the associate to ascertain what goods were included in this declaration, which were not in the former, and whether any had been taken, since those actions were brought.]

The Court therefore granted the rule on the second and third points only.

Mr. Serjt. *Lens* and Mr. Serjt. *Vaughan* now shewed cause. As the defendants represented the plaintiff as his assignees, they must establish an entire right in themselves as such, and must therefore shew not only that he was a trader, but that he had become a bankrupt. The moment the Jury found that the dealings by the plaintiff did not constitute a trading, the authority of the defendants altogether ceased, and

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as he was not liable to the bankrupt laws, they had no right whatever to demand or withhold his books of account. The evidence given at the trial was amply sufficient to warrant the verdict of the Jury, for it is quite clear that if a man buy any thing for his own use, and happens to have more than he wants, and sells the surplus, that will not make him a trader (*a*). At all events, it appeared that the plaintiff discontinued purchasing horses in *March*, 1816, and consequently, he was not a trader when the petitioning creditor's debt accrued. As the defendant *Jarvis* demanded the books, as being clothed with the authority of an assignee, it must be deemed a delivery on compulsion, and more particularly so, as the plaintiff had at first withheld them, but was reluctantly obliged to give them up on his last examination. This, therefore, was a tortious taking by the defendants, and it was not necessary for the plaintiff to prove a demand and refusal, before the commencement of this action; for such demand can only be necessary in a case of a doubtful nature. As, therefore, the defendants had no legal authority to demand the books, there being no foundation for the commission issued against the plaintiff, they became possessed of them unlawfully, and held them adversely, by which they had been clearly guilty of a conversion.

Mr. Serjt. *Taddy* and Mr. Serjt. *Peake*, in support of the rule, submitted, that it was a general rule of law, that where goods are delivered by one person to another, who claims them as a matter of right, such person must formally demand them, before he to whom they are delivered can be said to be guilty of a conversion. Here, the books were voluntarily delivered by the plaintiff to the defendants, as his assignees. They were therefore delivered for a legal purpose, and more particularly so, as the demand was made before the Commissioners at the time of his examination. In *Nix-*

(*a*) This was held by Lord *Ellenborough*, on the former trial of this cause.

on v. *Jenkins* (*a*), it was held, that where assignees bring an action of trover, for goods collusively sold on the eve of bankruptcy, they must prove a demand and refusal of the goods, to maintain such action. So, here, if the bankrupt wished to disaffirm the delivery, he should have given the defendants notice to return the books, as at the time they were delivered to them, they were not tort feasors, but were armed with the authority of the law. In *Bruen* v. *Roe* (*b*), it was decided by the Court, that if goods come to the defendant's hands, by delivery, finding, or bailment, an actual demand and refusal ought to be proved. Here, the books came to the defendants' possession by delivery, and they demanded them from the plaintiff as a matter of right, as they stood in the character of his assignees. In order to make them guilty of a conversion, it must either have been absolute, or the plaintiff should have given pregnant evidence of it. If he had brought an action of trespass, and the defendants had pleaded a licence, such plea would have been supported by the evidence given at the trial; for when the books were demanded and delivered, he did not object to the commission under which the defendants were appointed assignees. In *Jarrett* v. *Leonard* (*c*), which was an action by a bankrupt against the petitioning creditor, to try the validity of the commission, proof was given, that the bankrupt and petitioning creditor attended a meeting of the Commissioners, and discussed the petitioning creditor's debt, and produced their accounts, and that the bankrupt objected to part of the petitioning creditor's accounts, and the Commissioners ticked off such items in it as they allowed, and struck a balance; it was determined to be evidence to be left to the Jury, of an implied admission by the bankrupt, from his conduct and demeanour before the Commissioners, that such a balance was due. Here, no force was used by the defendants, and as

(*a*) 2 Hen. Blac. 135.——(*b*) 1 Sid. 264. S. C. 2 Selw. Ni. Pri. 3d edit. 1224.——(*c*) 2 Maul. & Selw. 265.

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the plaintiff submitted to the claim made by them as assignees, he cannot maintain this action unless they had proceeded to a sale, or there had been a demand and refusal of the books before its commencement. At all events, the defendants are entitled to a new trial on the merits, as two Juries have previously decided that the plaintiff was a trader, and as he himself had confessed that he had sold hides for profit. On the former trial, Lord *Ellenborough* asked what was the plaintiff's inducement to buy? Was it not a double one? So far as the horses were to be eaten by his dogs, he was not a trader, but as far as he intended to sell the skins in a course of years, must it not be inferred that he bought and sold for profit? It is quite immaterial what that profit may be, if it was the object of the party to obtain it by buying and selling.

Lord Chief Justice DALLAS.—A wrongful taking is of itself a conversion, and therefore no actual demand need in such a case be proved. The only question then is, whether in this case there was a wrongful taking? That will depend on the circumstances as proved at the trial. The books were demanded by one of the defendants, under the impression that the commission which had issued against the plaintiff was valid at the time of the demand. That depended on whether the plaintiff was a trader or not, and it is quite clear, that under the facts given in evidence at the trial before me, there was no trading within the meaning of the bankrupt laws; even if there had been, it ceased before the existence of the petitioning creditor's debt, and consequently, there was no valid commission ever issued against the plaintiff. If he had assented in the first instance to deliver the books, a demand and refusal might have been necessary as evidence of a conversion previous to the commencement of the action; but can it be said that these books were ever delivered over willingly to the defendants? The plaintiff even at his last examination contended, as he had uniformly done before, that he

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was not a trader, and attempted to resist the commission. He was a farmer, and as such excepted from the operation of the bankrupt laws. It appeared that the horses were not purchased by him for profit, as he gave the flesh to his dogs, and gave away what he did not want to other persons; and although he occasionally sold their skins and bones, still, it did not appear that he did so for the purpose of gaining a profit thereby. Although he resisted the commission, the defendants, as assignees under it, insisted upon the delivery of the books, and notwithstanding the plaintiff refused at first, he afterwards acquiesced, believing that he might have been committed if he did not do so. It appears to me, therefore, that the taking in question was unlawful, and consequently that this rule must be discharged.

Mr. Justice PARK.—I am clearly of the same opinion.—It would be too much to say that a person who buys dead horses for the purpose of providing food for his dogs, should thereby become a trader, and subject to the operation of the bankrupt laws, although he might sell their skins for a profit. At all events, it appeared that the plaintiff had ceased to be a trader before the petitioning creditor's debt arose. If the defendants had a right, as assignees, to demand and retain the books in question, a demand and refusal might have been necessary before the commencement of the action; but the main question is, whether under the circumstances, the delivery of the property by the plaintiff to them was voluntary or not? The defendants having claimed, as assignees, must be considered at the time to be armed with an authority as such, and the demand is equivalent to one made under the Commissioners warrant. The books were clearly given up against the will of the plaintiff, and the Commissioners might have imprisoned him had he disputed their authority, and refused the delivery. As, therefore, such delivery was compulsory, the defendants were thereby guilty of a conversion, and the plaintiff is consequently entitled to maintain the

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present action without having previously demanded the restoration of such books.

Mr. Justice BURROUGH.—The principal question is, whether the plaintiff was in point of fact a bankrupt or not at the time the property in question was delivered to the defendants? For what purpose did they take the books? They claimed them under the commission, for their benefit, as well as that of the other creditors of the plaintiff, but they cannot now insist upon the assignment of any of the plaintiff's property, for the Jury have found that he was not a trader, nor subject to the bankrupt laws at the time the commission issued. If therefore the commission, under which the defendants acted, was not well founded, the plaintiff's property was wrongfully taken, and the defendants were thereby guilty of a conversion.

Mr. Justice RICHARDSON.—I had at first some doubt whether, under the circumstances attending this case, there was sufficient evidence of a conversion. I agree with my Brother *Taddy*, that if the plaintiff had delivered his books to the defendants voluntarily on their claiming them in the character of assignees, that it would not have amounted to a conversion by them, and that this action could not be maintained without a previous demand of restoration by the plaintiff; but it must be observed, that the claim was made by them as being armed with the authority of the law. Such claim was at first refused by the plaintiff, and never fully acquiesced in by him; but he submitted to give the books up, on the supposition that the defendants were clothed with legal authority. In point of fact, however, they were not, and as they have obtained possession of them against the will of the plaintiff, I concur with the Court in thinking that this of itself constitutes a conversion, and consequently that the verdict found for the plaintiff ought not to be disturbed.

Rule discharged.

1821.

BUTT *v.* CONANT.

Monday, July 2.

MR. Serjt. *Vaughan* applied for a rule, calling on the defendant to shew cause why the plaintiff should not be discharged out of custody, in execution for costs. He founded his motion on an affidavit, which stated, that the plaintiff was taken in execution on the 13th *May*, 1820, on a *capias ad satisfaciendum*, for the costs of an action for false imprisonment, brought by him against the defendant (*a*), and in which the latter had obtained judgment; that the costs of such action amounted to 155*l.*, for which the plaintiff was taken in execution, and which sum had been since paid to the defendant by the direction of the Lords of the Treasury.

The learned Serjeant therefore submitted, that as the costs had been satisfied to the defendant, the plaintiff was entitled to his discharge, or otherwise he might be imprisoned for life.

But the Court held, that there was no colour for the application—that the plaintiff was no party as between the defendant and the Treasury, nor was he any-wise connected with them; neither did it appear that the costs had been paid on his account. That it would have been quite a different case if they had been paid for him by a friend, but that the affidavit was insufficient, as it merely stated that they had been paid to the defendant by the order of the Treasury.

Rule refused.

In order to discharge a plaintiff out of custody, who is in execution for costs, it must appear that such costs were paid on his account; where, therefore, a plaintiff was in execution for costs arising to a magistrate from a verdict in an action for false imprisonment, an affidavit, stating that they had been paid to the latter by the Treasury, was held insufficient.

(*a*) See ante, vol. iv. page 195.

1821.

Tuesday, July 3.

WATSON *v.* PILLING.

Where a defendant was described in process generally, he may be declared against as administrator; the object of the writ being merely to bring him into Court.

MR. Serjt. *Hullock*, on a former day in this Term, had obtained a rule *nisi*, that the notice of declaration, and the declaration filed by the plaintiff against the defendant in this cause, and all the subsequent proceedings thereon, might be set aside for irregularity, with costs, on the ground that the plaintiff had sued out common process against the defendant generally, and given notice of declaration, and declared against him as administrator. In *Tidd's Practice* (*a*), it is said, that upon common process, the plaintiff may declare *qui tam*, or as executor or administrator, but that this rule will not hold *è converso*; as where a writ was sued out by the plaintiffs, as executors, and they declared in their own right, it was deemed a sufficient variance for discharging the defendant out of custody, on filing common bail. *Douglas* v. *Irlam* (*b*). That, however, does not apply to the case of a defendant; if it did, and the proceedings in question are held to be regular, the plaintiff might declare for a new cause of action, for the situation of the defendant is altogether altered by proceeding against him in his representative character. At all events, the plaintiff having declared in chief, the declaration should have been in conformity to the writ; and as it is not so, it is a variance. Besides, it is highly inconvenient to sue a defendant generally, and declare against him as executor or administrator, as he might know that he was not personally liable; and if he was aware that the plaintiff had sued him in his representative character only, he might have prevented further proceedings and costs, by settling the action, but he could not learn that he was proceeded against in such character, until he was served with the notice of declaration.

(*a*) Vol. 1. 7th edit. 458.——(*b*) 8 Term Rep. 416.

Mr. Serjt. *Lens* now shewed cause.—There is no weight whatever in the objection that has been taken. In *The Weaver's Company* v. *Forrest* (*a*), it was decided, that where process is sued out generally, the plaintiff may declare *qui tam*, or as executor, it not being usual to insert in the process on what account, or in what right, the party sues; and that principle must equally, if not more strongly; apply to the case of declaring against an executor or administrator, who is not so described in the process. The object of the process is merely to bring the defendant into Court; for in *Foster* v. *Bonner* (*b*), it is said, that where a defendant is brought into Court by a bill of *Middlesex*, upon a supposed trespass, in order to give the Court a jurisdiction, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper; and that the suing out a *latitat* is not considered as the commencement of the suit, but a process only to bring the party into Court; and the writ of *capias* in this Court is precisely analogous to the bill of *Middlesex* or *latitat* in the King's Bench. No solid distinction can be taken between a plaintiff and defendant, and therefore there is no ground for this application.

Mr. Serjt. *Hullock*, in support of the rule, admitted, that there was no authority in favour of the defendant's application, and that although it was usual to proceed as the plaintiff had done, still, that such a practice was not founded on reason or principle. In *Lloyd* v. *Williams* (*c*), the Court discharged a rule to stay proceedings for irregularity, because the *capias* did not express that the plaintiff sued *qui tam*, although the declaration did; but Mr. Justice *Yates*, in *Canning* v. *Davis*, there cited, is said to have drawn this distinction: "Though the plaintiff may stile himself executor, or give himself any other superfluous description in the process, and declare otherwise, yet this will not hurt; for

(*a*) 2 Str. 1232.——(*b*) Cowp. 455.——(*c*) 2 Sir Wm. Blac. 722.

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the demand is still the same; but where a plaintiff has stiled himself *qui tam* in the *latitat*, and declared, omitting the *qui tam*, the very nature of the demand is altered; the process importing a demand to the king and the plaintiff, and the declaration a demand to the plaintiff only."

If a defendant may be sued generally, and declared against as executor or administrator, he will not be safe in the payment of simple contract debts, or administering assets, in the interval between the suing out of the process and the filing of the declaration; besides, the plaintiff has two Terms to declare, and in this Court the defendant cannot apply for a bill of particulars until after appearance. As, therefore, he has in this case been sued in his personal character, he must be declared against in the same right; and although the practice may be otherwise, it is productive of inconvenience and injustice.

Lord Chief Justice DALLAS.—By the practice of this Court, the common *capias* requires the defendant to answer the plaintiff in trespass, and if the argument adduced for the defendant be just, and were to prevail, a plaintiff can only declare in that form of action; but it has long since been decided, that he may declare in whatever action he thinks proper. No authority has been cited in favour of the defendant's application; but it has been said, that there is a difference to be made between the case of a plaintiff and defendant, but there appears to be no ground for such a distinction, either in practice or in principle. The only object of the process is to compel the party against whom it is issued to appear; and when he is in Court, the plaintiff in his declaration discloses the form and cause of action for which he sues. On this ground, therefore, it appears to me that there is no foundation for the present application.

Mr. Justice BURROUGH.—It is quite clear that the object of the process is merely to bring the defendant into

Court, and if we were to adopt the argument adduced for the defendant, we must hold, that according to the present form of the process, a plaintiff can only declare in an action of trespass.

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Mr. Justice RICHARDSON.—It has long since been established, that on common process, the plaintiff may declare as an executor or administrator; and it appears to me, that this principle applies more strongly to the case of a defendant who is declared against in his representative character. Although it may be inconvenient to him to be at first unacquainted with the precise nature of the plaintiff's claim, still the Court ought not either to alter or extend the practice in this respect.

Rule discharged, with costs.

WATTS, Demandant; MILNE, Tenant; PICKFORD and Wife, Vouchees.

Tuesday, July 3.

MR. Serjt. *Peake* moved that this recovery might pass, on an affidavit which stated, that the vouchees were resident in *Guernsey*; that the necessary documents for taking the acknowledgment had been sent to the Commissioners there, and that they had returned the usual affidavit, stating, that such acknowledgment had been taken, but that they had not indorsed their names on the *dedimus*, although they had affixed their signatures to the warrant of attorney, which appeared to have been duly executed.

In a recovery, where the vouchees resided in *Guernsey*, and the acknowledgment was taken before the Commissioners there, who neglected to indorse their names on the *dedimus*:—The Court would not permit the recovery to pass, but ordered the documents to be returned to them for such indorsement.

But the Court held, that it was absolutely necessary that the *dedimus* should have been signed by them; and ordered the documents to be returned to *Guernsey* for that purpose.

The learned Serjeant therefore took nothing by his motion.

1821.

Tuesday, July 3.

Matthews *v.* Royle.

Where a person, not having been admitted an attorney of this Court, had acted as such by suing out process; they would not grant an attachment against him, but left the party to sue for the penalty given him by the statute 2 *Geo.* 2. *c.* 23. *s.* 24.

Mr. Serjt. *Vaughan* moved for an attachment against a person by the name of *Parker*, to whom the plaintiff had been recommended to bring an action against the defendant, on three several bills of exchange of 10*l.* each. He stated, that *Parker* had represented himself to be an attorney of this Court, and required 2*l.* in advance, which had been paid to him by the plaintiff, on which he accordingly sued out process on the bills against the defendant; and an affidavit was now produced, which stated, that *Parker* had never been admitted an attorney of this Court.

But, *per Curiam*.—We cannot interfere in this summary way; a specific remedy is pointed out by 2 *Geo.* 2. *c.* 23. *s.* 24, by which it is enacted, that if any person, shall in his own name, or in the name of any other, sue out any process, or commence, prosecute, or defend any action or proceeding, in any of the courts of law, as an attorney, for or in expectation of any gain, fee, or reward, without being admitted and enrolled; every such person, for every such offence, shall forfeit and pay 50*l.* to the use of the person who shall prosecute him for the said offence. As, therefore, the plaintiff may sue *Parker* and convict him of the penalty, the Court will not interfere by granting an attachment against him.

The learned Serjeant therefore took nothing by his motion.

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CAMPION *v.* BENYON and Another.

Tuesday, July 3.

THIS was an action on the case for the infringement of a patent granted to the plaintiff on the 13th *April*, 1813, for "A new and improved method of making and manufacturing double canvass and sail-cloth with hemp and flax, or either of them, without any starch whatever." The declaration contained several counts, charging the defendants with making and selling divers large quantities of canvass and sail-cloth, in imitation of the plaintiff's, and using his invention as well as putting it in practice, and counterfeiting and imitating the same, in whole and in part. The defendants pleaded Not Guilty.

Where a patent was obtained, for "A new and improved method of making and manufacturing double canvass and sail-cloth with hemp and flax, without any starch whatever," and the specification described the invention to consist in an improved texture or mode of twisting the threads, to be applied to the making of unstarched cloth;—on its being proved at the trial that the exclusion of starch had been before adopted:—Held, that such patent was void, as being taken out for more than the patentee had really discovered.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last *Hilary* Term, the plaintiff gave in evidence the following specification of his invention: viz.—"I, the said *Robert Campion*, do hereby describe and ascertain the nature of my said invention, and the manner in which the same is to be performed, as follows; that is to say, my new and improved method of making and manufacturing double canvass and sail-cloth with hemp and flax, or either of them, without any starch whatever, consists in first spinning the warp yarn, either by hand or with the sort of machinery generally used for such purposes, without wet or dampness of any kind whatever; afterwards properly cleansing and bleaching the same in the best manner; and having made it perfectly dry from that process, placing and working it on a machine similar to those commonly used in cotton manufactories, round the upper bobbins of which machine the same is rolled in single threads, so as that when the said machine is put in motion in the usual manner, the effect thereof is to untwist those threads, and take out of them all the twist

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that was made therein by the operation of spinning, and to twist or interweave two of them into one thread, or to half the number of bobbins in the lower part of the said machine, the reverse or contrary way to that in which the single threads or warp had been before twisted: by this process the yarn is not so hard twisted as at first, and in the operation of thus reversing the twist, the fibres of the flax are so closely united, and are laid or arranged so perfectly level and even in every respect, as to render the warp yarn or threads much stronger than any double threads are by the usual mode of manufacture with starched chains. The double threads, or warp yarn, being thus prepared and twisted together into one chain or warp, the same is thereby preserved from injury whilst passing through the slay-walk, in the subsequent operation of weaving; and thus, the necessity of using any starch, or substitute for starch whatever, which, in the ordinary mode of manufacture, is used only for the purpose of uniting the two threads or warp, and making them smooth, so as to pass through the slay-walk with facility and without injury, is altogether superseded. The canvass thus manufactured is much more pliant than what is made with starch, or in any other manner, and is stronger, not only because its being so very regular and even, necessarily makes the stress equal in every part, but because, in consequence of there being no starch used in the manufacture, the weight of that material, which is considerable in every web or piece, must be supplied by an additional quantity of warp and woof, and being soft and pliant, it will thicken when used, and become of a closer texture, without breaking or running up, or being liable to mildew or turn black. Where hemp is used in the manufacture, I hackle the same with soft soap, and a very small proportion of oil, in preference to the entire use of oil, as generally practised; for this preparation lays the fibres as even as oil does, and at the same time counteracts the viscous qualities of the hemp, and, with a proper quantity of pearl or pot-ash, assists in

bleaching the yarn, and obtaining a good colour in that process. The advantages of my invention, of course extend to canvass made of unbleached yarn; and the only difference in the manufacture thereof, is the process of bleaching being then dispensed with."

On the part of the plaintiff it was proved, that the old plan of manufacturing double canvass and sail-cloth, was by spinning yarn, and putting two threads together, uniting them by starch, then drying them, and weaving them in the common way; and that the principal inconvenience complained of was damp and mildew, as the starch corroded and spoilt the thread; that the object of the present patent was to bring the yarn as close together without starch as with it; and that the plaintiff's process had that effect, and differed from that of the defendants by reversing the twist, which was entirely a new invention, and rendered the canvass much better and more durable than it was by the former method.

The defendants gave in evidence a patent obtained by Mr. *Dempster* on the 30th *August*, 1803, for "The invention of certain improvements in the manufacture of canvass or strong cloths of vegetable materials, for sails, tents, packages, and other useful purposes;" the specification of which was as follows, *viz.*—"I, *Cathcart Dempster*, do hereby declare, that the nature of my said invention, and the manner in which the same is to be performed, are described as follows; that is to say, instead of using single yarns not twisted, but glued together with starch, or other mucilage, in order to form the warp of the canvass, as is now commonly done, to the great injury of the article, by rendering it liable to spontaneous destruction by mildew, I use twine, composed of two or more yarns of prime materials, of equal size and strength, both for the warp and woof, and I am by that means enabled to weave, and I do weave my canvass without starch, or any other mucilage whatever, and do thereby produce an article nearly twice as strong as common canvass

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of the same weight and fineness, and with the advantage that its threads have an equal bearing on one another in all directions; not liable like the common canvass, to split longitudinally, being much stronger in the cross direction, not capable of rot or mildew, from the presence of mucilage, and extremely durable, because it is subject to no irregular action of sharp cutting threads on its woof, but is only exposed to the fair, slow, and gradual wear of its well combined and duly proportioned component parts, which maintain their relative strength to the last."

Witnesses were then called to prove that double canvass and sail-cloth had been continually made without starch since *Dempster*'s patent was taken out; that the plaintiff's was not a new mode of twisting the threads, but that there was in fact no other method; that the reversing the original twist was not new, as it had been before universally adopted and known in the earliest times, as on the examination of a wrapper enclosing an *Egyptian* mummy, the thread of which it was composed, was twisted in the same manner, and that so far from the plaintiff's process differing from that pursued by the defendants, they were identically one and the same; and that if the twist was not reversed, it would not work at all.

His Lordship left it to the Jury to say, first, whether the plaintiff's patent was an original discovery for making double canvass and sail-cloth without starch; and secondly, whether it was a new or improved method of doing that which had been discovered before; and they found, first, that the invention was not new, but that it was an improved method of making those articles, and accordingly found a verdict for the plaintiff.

Mr. Serjt. *Lens*, in the last Term, had obtained a rule *nisi*, that this verdict might be set aside and a nonsuit entered, or a new trial granted, on the grounds, first, that so far from the plaintiff's invention being new, it was proved that sail-

cloth had been manufactured without starch since the patent had been obtained by *Dempster*, and that the exclusion of that article was highly beneficial, and of the greatest importance; secondly, that the specification introduced a different invention from that sought to be produced by the patent; thirdly, that the patent was too large, as the plaintiff claimed the discovery of making canvass and sail-cloth without starch, which had been known before. All the plaintiff's witnesses were ignorant of *Dempster*'s having obtained a patent, and therefore gave to the former the merit of manufacturing those articles without starch. A patent cannot be taken out for the mere working an article with more skill than another, but there must be a novelty and improvement in the mode of manufacture. It was also proved, that the process used by the plaintiff in twisting and reversing the yarn, was similar to that adopted by *Dempster*. At all events, the specification is ambiguous and equivocal in terms, and renders the patent totally void; and as the weight of evidence was clearly in favour of the defendants, they are at least entitled to a new trial on the merits.

Mr. Serjt. *Vaughan* and Mr. Serjt. *Pell* now shewed cause. The Jury have found that the plaintiff's invention was an useful discovery, and on taking the general merits of the case into consideration, there is no ground for saying that the verdict was against evidence. With respect to the patent's having been taken out in larger terms than the invention warrants, the plaintiff does not claim to have made the first discovery of making sail-cloth without starch; if he had, there might have been some weight in the objection; but he has merely obtained his patent for a *a new and improved method* of manufacturing it, without the use of that article. The specification, as well as the patent, merely import, that he was the discoverer of a new and improved method in the making of unstarched cloths, and not that he was the original inventor. The mode as to twisting, untwisting, and reversing the threads, is at all events,

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a new invention, and in which the chief merit of the patent consists; and *Dempster*'s specification is wholly silent on this point, nor is there any mention there made of his mode of disposing of the original twist. In *Huddart* v. *Grimshaw* (*a*), a patent was taken out for a new mode of making great cables and other cordage, so as to attain a greater degree of strength therein, by a more equal distribution of the strain upon the yarns; and it was determined, that even where the objects of two grants are substantially the same, they may both be valid, if the modes of attaining the desired effect be essentially different (*b*); and Lord *Ellenborough* there said (*c*). "There are common elementary materials to work with in machinery, but it is the adoption of those materials, to the execution of any particular purpose, that constitutes the invention, and if the application of them be new, if the combination in its nature be essentially new, if it be productive of a new end, and beneficial to the public, it is that species of invention, which, protected by the king's patent, ought to continue to the person the sole right of vending it." Apply that principle to the present case, and the plaintiff will be found to have discovered a new combination of old materials, productive of a new end, and beneficial to the public; for he has specifically pointed out the new mode of texture of the threads, while, in *Dempster*'s specification, he has merely stated, that he uses twine composed of two or more yarns of equal size and strength, both for the warp and woof. [Lord Chief Justice *Dallas*.—In *Huddart* v. *Grimshaw* Lord *Ellenborough* observed (*d*), that "if prior to the time of a person's obtaining a patent, any part of that which is of the substance of the invention has been communicated to the public in the shape of a specification of any other patent, or is a part of the service of the country, so as to be a known thing, in that case he cannot claim the benefit of his patent." Here, however, the question paramount is, whether the plaintiff has not taken out a patent for more than he

(*a*) Davies on Patents, 265.——(*b*) Id. 290.——(*c*) Id. 278. (*d*) Id. 279.

can legally claim as his own discovery.] Although sail-cloth might have been made without starch before, still, the plaintiff has a right to his patent for his new method of manufacturing it, provided it be an improvement on that obtained by *Dempster*. The specification is not ambiguous in terms, but points out with clearness and perspicuity the improved method of manufacturing unstarched canvass. The plaintiff's invention need not consist in the using new articles, but in the manufacturing of articles in a different manner than was before known, as the specification imports his discovery to be a new and improved method. The grammatical and legal construction of the whole of the instrument must be the same, and although the patent itself may be ambiguous in its terms, it must be taken together with the specification; on reference to which, it is perfectly clear, that the plaintiff claims only a new method of manufacture. By the word "improvement," the plaintiff admitted that starch had been used before, and as the Jury have found that the method was new, there is no reason to disturb their verdict.

Mr. Serjt. *Lens* and Mr. Serjt. *Hullock*, in support of the rule.—The main point in this case is reduced to a question of law, *viz.* whether the patent be too large in its terms or not. Although the plaintiff claims only for an improvement, still, it must be inferred that he intended to claim the discovery of the rejection of starch, as well as an improvement in the texture of the cloth; for he has stated it to be an improvement of making canvass and sail-cloth without any starch whatever. If he had merely used the word "starch," it might have been doubtful, as there might have been only a small quantity of that article used; and had he intended to confine his claim to the discovery of an improved method of weaving the cloth, he should have called his invention "an improvement in the method of making double canvass and sail-cloth without starch." By the word "whatever," it would seem that a small proportion of starch

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had been previously used, but that the plaintiff had dispensed with the necessity of the use of that article altogether in his improvement; but it was proved as a fact, that the exclusion of it was known and adopted ever since 1803.

A patent must be construed strictly by the Court, and in favour of the public; and if it be ambiguous on the face of it, and the specification is not clear and precise, the effect of the patent will be altogether destroyed. In *Turner* v. *Winter*, Mr. Justice *Ashhurst* said (*a*), that "As every patent is calculated to give a monopoly to the patentee, it is so far against the principles of law, and would be a reason against it, were it not for the advantages which the public derive from the communication of the invention after the expiration of the time for which the patent is granted. It is therefore incumbent on the patentee to give a specification of the invention, in the clearest and most unequivocal terms of which the subject is capable; and if it appear that there is any unnecessary ambiguity affectedly introduced into the specification, or any thing which tends to mislead the public, in that case the patent is void." The universal principle in cases of this description is, that an *ambiguitas patens* cannot be explained or cured; whilst, on the other hand, an *ambiguitas latens* may. It has been said, that though the patent itself be ambiguous, it may be explained by the specification; but there also the plaintiff's principal object seems to have been the exclusion of starch, as he states that the canvass thus manufactured, is more pliant than that made with that article, or in any other manner; that, therefore, leaves the patent equivocal and ambiguous. [Mr. Justice *Richardson*. In some specifications, a party expressly points out that he does not claim for certain articles or purposes.] Here, the plaintiff has claimed the discovery of the whole of the invention, when he should have confined his right to the improvement or discovery produced by him alone.

(*a*) 1 Term Rep. 605. S. C. Davies on Patents, 151.

In *The King* v. *Else* (*a*), it was held, that if an invention consists in an addition or improvement only, and the patent is for the whole machine or manufacture, it is void; as where a patentee claimed the exclusive liberty of making lace composed of silk and cotton thread mixed, and not of any particular mode of mixing them; upon its being clearly proved and admitted, that silk and cotton thread had been before that time mixed on the same frame for lace, in some mode or other, the patent was declared void. In *The King* v. *Arkwright* (*b*), Mr. Justice *Buller* laid down the following, among other rules, that "as to the invention, the rule of law was very different from what it was on the specification; for as on the specification, if any one part of the invention were not sufficiently described, the patent was void; So, on the invention, if any one part of it be new and useful, that is sufficient to sustain a patent for the particular object of the invention; but if the invention consists of an addition or improvement only, and the patent goes to the whole machine, it would be a very different question, whether such patent could be supported." In *Hill* v. *Thompson*, where the Lord Chancellor ordered a trial at law to try the validity of a patent, his Lordship, after the cause had been tried, said (*c*), that "in his direction to the Jury, the Judge had stated it as the law on the subject of patents, first, that the invention must be novel; secondly, that it must be useful; and thirdly, that the specification must be intelligible. I will go further (observed his Lordship), and say, that not only must the invention be novel and useful, and the specification intelligible, but also that the specification must not attempt to cover more than that which being both matter of actual discovery, and of useful discovery, is the only proper subject for the protection of a patent. And I am compelled to add, that if a patentee seeks by his specification any more than he is strictly entitled

(*a*) Bull. Ni. Pri. 7th edit. 76 (*d*). S. C. Davies on Patents, 144. 11 East, 109, n.——(*b*) Bull. Ni. Pri. 76 (*c*). S. C. Davies on Patents, 61.——(*c*) 3 Meriv. 629.

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tent, I thought the object of the patentee was to make such canvass or cloth without starch, and that the exclusion of that article was a new discovery, and adopted by him for the first time, nor do I now see any reason to think otherwise.—With respect to the specification, it must contain a full and accurate explanation how the means of the patent are to be carried into effect. If there be a departure in terms from the patent, the whole is void; it must be commensurate with the patent itself, and if it coincides with it in terms, it is open to the same objections as the patent. The specification, after describing the different processes of spinning and twisting the flax and yarn, proceeds in the following words, "and thus, the necessity of using any starch, or substitute for starch whatever, which in the ordinary mode of manufacture is used only for the purpose of uniting the two threads or warp, and making them smooth, so as to pass through the slay-walk with facility, and without injury, is altogether superseded, and the canvass thus manufactured, is much more pliant than what is made with starch, or in any other manner." It appears, therefore, that the patentee had the omission of the use of starch always in view. The specification then proceeds to allege the other advantages sought to be derived from the not using starch, *viz.* that "the canvass is stronger, not only because its being so very regular and even, necessarily makes the stress equal in every part, but because, in consequence of there being no starch used in the manufacture, the weight of that material, which is considerable in every web or piece, must be supplied by an additional quantity of warp and woof, and being soft and pliant, it will thicken when used, and become of a closer texture, without breaking or running up, or being liable to mildew or turn black." As well, therefore, on the terms of the specification as of the patent itself, I have no doubt but that the claim of the plaintiff is of too extensive a nature; it is not confined to a new and improved method of making and manufacturing the canvass and sail-cloth either in the weaving

or twisting the threads, but of manufacturing them without any starch whatever, which it appears had been done before, and was therefore not a new or original discovery. On this ground, therefore, I am clearly of opinion that the patent in question is void.

Mr. Justice PARK.—I am extremely happy that this case is narrowed to a mere question of law, but I entertain no doubt that the weight of evidence was in favour of the defendants, so that at all events they would have been entitled to a new trial. Questions of this description involve points of the greatest importance, and it is clear, that ingenious men who produce inventions for the exercise of trade, which may be beneficial to the public, have a claim on them for such inventions, and the expence and labour which they may have incurred in the production of such discoveries; but on the other hand, it is equally important that the inventor should not enjoy a monopoly, but that his invention should be turned to the public account after he has been satisfied for the trouble and expence he may have had in its production. It is therefore required in all cases of this description, that in the specification of a patent, the nature of the invention must be accurately and particularly described, and the statement of the claims of the patentee must be set forth in the most minute detail. My Lord Chief Justice thought at the trial, on the first view of this case, as all other persons who might have read this patent certainly would, that the principal part of the plaintiff's invention consisted in manufacturing double canvass and sail-cloth without any starch. In order to ascertain precisely, however, what the patentee meant to claim, it is necessary to look at the specification. Taking it either altogether, or in part, it is impossible to read it without supposing that the omission of starch was the principal object which the plaintiff had in view, and the main part of the improvement he intended to claim as his discovery. He might have modified his claim by stating that the exclusion

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of starch formed only part of his invention, and that his improvement did not solely consist in the rejection of that article; but in the specification he says, that "the necessity of using any starch, or substitute whatever, is altogether superseded; and that the canvass thus manufactured was much more pliant than what is made with starch, or in any other manner, and stronger, and not liable to mildew or turn black." The patent, too, was taken out for "a new and improved method of making canvass and sail-cloth without any starch whatever;" that, therefore, is stronger in terms than the specification. Some of the plaintiff's witnesses were not aware that starch had been before disused; but those for the defendants proved that double sail-cloth had been made without it by Mr. *Dempster* in 1803, and for which he had obtained a patent. He stated in his specification that he weaved canvass without starch, or any other mucilage whatever, and that among other advantages, it was not capable of rot or mildew from the presence of mucilage, and that it was extremely durable, because it was subject to no irregular action of sharp cutting threads on its woof. Here, if the plaintiff had intended to claim an improved method in spinning and twisting the threads composing the cloth, he might have confined his patent to that alone, and disclaimed the exclusion of starch, as being his own discovery. Comparing the specification, therefore, with the substance of the patent to which it refers, it is impossible that it can be supported, for the patentee has claimed more than the merit of an improvement, as he has stated that he had discovered a new method to make canvass and sail-cloth without starch. In *Hill* v. *Thompson* (*a*), it was decided, that if a patent is taken out for more than is strictly the inventor's addition or improvement, or for discovery, when it is merely addition or improvement—it is bad. Although a person may have a patent for an improvement on an old discovery, still, if he claims the merit of such discovery for the whole

(*a*) Ante, vol. ii. page 424.

of the manufacture, such patent must be wholly void. As, therefore, it was shewn that canvass of this description had been before manufactured without the use of starch, and that the exclusion of that article was known before; I am of opinion that the patent is void, and consequently that the plaintiff is not entitled to recover.

Mr. Justice BURROUGH.—I am clearly of opinion that the verdict found for the plaintiff is against evidence, but the Court are only to look at the law of the case for their decision. All the previous cases, as well as the reason of the thing, shew that a patent can only be taken out for a new discovery or improvement; and it is equally clear, that the specification must cover and support the patent. For what purpose does the patent in question appear to have been obtained? It is stated to be for "a new and improved method of making canvass and sail-cloth with hemp and flax, or either of them, without any starch whatever." If there be any discovery, it appears from the evidence at the trial, as well as from the specification itself, to consist in a new mode of preparing and twisting the hemp or flax for making the canvass and sail-cloth, and in point of fact the patent should have been taken out for that invention alone. It might then have been good, but instead thereof, the plaintiff has described his discovery to consist in an improved method of manufacturing those articles without any starch whatever. The title of the patent, therefore, appears to me to be clearly wrong, and in the specification, the exclusion of starch is treated by the plaintiff as the most essential part of his improvement. The King has, in fact, been deceived, in granting the patent to the plaintiff, as he has claimed what was known before, and is, consequently, not entitled to the discovery or invention he thereby sought to establish.

Mr. Justice RICHARDSON.—If it were necessary to give any opinion as to the weight of evidence produced at the

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trial, I should feel myself bound to state that the Jury had come to a wrong conclusion. But I fully concur with the Court in thinking, that the plaintiff must be nonsuited, as he has taken out his patent for more than he has invented or discovered. The law is perfectly clear as to this point. If the specification had stated, that the plaintiff claimed no merit as to the exclusion of starch, it might, perhaps, have cured the general terms contained in the title of the patent, and rendered it valid. The true and sound principle is, that although on the one hand, ingenious persons ought to be protected and rewarded for their discoveries, still, on the other, care must be taken, that others, as well as the public at large, must not be restricted from making improvements on that which is still open to their ingenuity, *viz.* of doing any thing which is not peculiar to the immediate process employed by the patentee. Here the patent itself appears to consist of an improvement in making double canvass and sail-cloth without starch. The specification confirms it, by referring to the advantages to be derived from the omission of that article in the manufacture of those cloths. That discovery appears to have been made long since, and therefore the patent cannot be sustained.

Judgment of nonsuit.

Wednesday, July 4.

JENKINS and Another *v.* REYNOLDS.

The defendant addressed the following letter to the plaintiffs, which he dated and signed:—"To the amount of 100*l.* consider me as security on *J. C.*'s account:"—Held, that it was not a sufficient memorandum to bind the defendant under the statute 29 *Car. 2. c. 3. s. 4*, the consideration or promise for the undertaking not having been expressed in such letter.

THIS was an action of *assumpsit*. The first count of the declaration stated, that on the 27th *April*, 1815, in consideration that the plaintiffs, at the request of the defendant, would sell and deliver on credit, to one *James Cowing*, carrying on trade and commerce, under the style and firm of

James Cowing and *Co.* certain goods, wares, and merchandizes; the defendant undertook and promised the plaintiffs to be security to them, on the account of the said *James Cowing*, by the style, &c. of *James Cowing* and *Co.* to the amount of 100*l.* That the plaintiffs, confiding in the promise, did afterwards, on divers days and times, sell and deliver to *Cowing*, on certain credit agreed upon between the plaintiffs and *Cowing*, divers goods, wares, and merchandizes, amounting in the whole to a large sum of money, to wit, 300*l.*, and that although the said credit and time of payment had long since elapsed, *Cowing* had not paid;—whereof the defendant had notice. Yet, that he had not paid the plaintiffs the said sum of 100*l.*, or any part thereof, but the whole remained due. The second count stated, that in consideration that the plaintiffs, at the like request of the defendant, would sell and deliver on credit to *Cowing*, certain other goods, &c., the defendant undertook and promised the plaintiffs to be accountable to them for the payment, by *Cowing*, of the price of such last-mentioned goods, to the amount of 100*l.* The count then proceeded with similar averments, as in the first count, and assigned a breach accordingly. The declaration also contained counts for goods sold and delivered, money paid, laid out, and expended by the plaintiffs to the defendant's use, and on an account stated.

The defendant having pleaded the general issue, the cause came on to be tried before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after *Hilary* Term, 1820, when a verdict was found for the plaintiffs, damages 100*l.* subject to the opinion of the Court, with liberty to the defendant to move to enter a nonsuit. A motion was accordingly made, and a rule to shew cause granted, which rule coming on in the last *Hilary* Term, the Court ordered the question to be brought before them on the following case:—

The plaintiffs are *Manchester* warehousemen, and had had dealings with *James Cowing*, who had carried on business

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in the style and firm mentioned in the declaration, and had become bankrupt shortly before *April*, 1815. On or about the 27th *April*, 1815, *Cowing* delivered the following letter, which was written and signed by the defendant, to the plaintiffs, viz.

"To Messrs. *Jenkins* and *Jones*."

"Gentlemen,

"To the amount of 100*l*., be pleased to consider me as security on Mr. *James Cowing* and *Co.*'s account.

"I am, Gentlemen, your obedient servant,

"*Samuel W. Reynolds*,

"*27th April*, 1815." "47, *Poland Street*,"

Subsequently to the delivery of this letter to the plaintiffs, they supplied *Cowing* with several parcels of goods on credit, at several times between the said 27th *April*, 1815, and *September*, 1819, to a large amount, and in the said month of *September*, 1819, *Cowing* again stopped payment, and there being upwards of 200*l*. due from him to them, on account of goods supplied, this action was brought, for the purpose of recovering 100*l*. from the defendant, by virtue of and under his letter of the 27th *April*, 1815, and the question for the opinion of the Court was,

Whether the plaintiffs were entitled to recover that sum from the defendant? If the Court should be of opinion that the plaintiffs were entitled to recover in this action, the verdict was to stand, but if they should be of a contrary opinion, then a nonsuit was to be entered.

The case now came on for argument, when

Mr. Serjt. *Peake*, for the plaintiffs, admitted, that he felt a considerable degree of difficulty after the very recent decision of the Court of King's Bench, in *Saunders* v. *Wakefield* (*a*), which was confirmatory of the doctrine laid down in *Wain* v. *Warlters* (*b*), although the authority of that latter

(*a*) 4 Barn. & Ald. 595. (*b*) 5 East, 10.

case has been impeached, both at law and in equity. Before the statute of Frauds was passed, any promise by one person to pay the debt of another, or by an executor to pay a sum due from his testator, and be answerable out of his own estate, or to charge any person upon any agreement made in consideration of marriage, would have been binding, although there was no written contract or evidence of such promise; for it might have been proved wholly by oral testimony. The object of the passing of that statute was not to vary the liability of the party, but merely to introduce a new rule as to the evidence to establish a promise, *viz.* that no person should be bound, by a special promise, to answer the debt of another, unless such promise were in writing, and signed by the party to be charged therewith. How can a party be defrauded, when he has given a written promise, or why should it be necessary that the whole subject-matter of the agreement or undertaking should be particularly expressed on the face of the instrument? Any memorandum, if signed by the party, is a sufficient compliance with the terms of the statute. It is true that a plaintiff must state a consideration in his declaration, but it does not follow that the whole of the promise must be set out in form, as it is sufficient for him to produce a written instrument or memorandum of the promise in evidence at the trial. The object of the statute is answered by a bare memorandum of the agreement in writing, that is, so much of it as is obligatory on the party to be charged therewith. It is therefore nugatory to suppose that the legislature intended that the whole of the contract should be stated, as they have expressed themselves in the alternative, *viz.* or that some memorandum thereof, in writing, shall be sufficient.

The 4th and 17th sections of the statute are synonimous as to the terms of a memorandum to be signed by the party to be charged, and although the word "agreement" is not used in the latter section, still, it requires a memorandum of the bargain to be made and signed by the party to be chargeable. Even supposing that *Wain* v. *Warlters* may be

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supported on legal principle, still, it may be distinguished from this case, as there, there was not an absolute promise by the defendant to pay, whether *Hall* paid or not, although such promise seemed to imply a request of forbearance to a certain period. Here, there is no ambiguity whatever on the face of the defendant's letter, for *Cowing* and *Co.* were to be considered as the principal debtors to the plaintiffs, and in case they failed in their payment, the defendant was to be considered liable to a certain amount. The case of *Stadt* v. *Lill* (*a*), is in favour of the plaintiffs, and the memorandum there was nearly similar in terms to that in *Wain* v. *Warlters*, *viz.* "I guarantee the payment of any goods which *J. Stadt* delivers to *J. Nicholls*;" and it was considered that there was an implied request from the defendant to the plaintiff, to furnish goods; and although it was objected that the agreement was not sufficiently set out, inasmuch as there was no mutuality, and the defendant could not have supported an action against the plaintiff for not furnishing the goods for which, when delivered, the defendant was bound to guarantee, yet the objection was over-ruled. So, in *Egerton* v. *Mathews* (*b*), which is a leading case as to the construction of the 17th section of the statute, it was expressly decided, that a memorandum signed by the defendant, on the sale of goods, was sufficient, without expressing any consideration for the purchaser's promise. That decision, therefore, and *Wain* v. *Warlters*, cannot stand together; for the cases arising on the 17th section must either require the same strictness of construction with those of the 4th, or these latter must be construed with the same liberality as the others; and no sound distinction can be drawn between "contract" or "agreement," as adopted in those sections. [Mr. Justice *Richardson*.—The decision in *Egerton* v. *Mathews*, turned expressly on the 17th section; and the Court there drew a distinction between the words "bargain" and "memorandum": and Lord *Ellenborough* observed (*c*), that "the

(*a*) 9 East, 348. S. C. 1 Camp. 242, *nomine Stapp* v. *Lill*.——— (*b*) 6 East, 307. —— (*c*) Id. 308.

writing was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it is all that the statute requires."] In *Ex parte Minet* (*a*), the Lord Chancellor observed, that "there was a variety of authorities directly contradicting the case of *Wain* v. *Warlters*; which is a most important case with reference to the consequences; for the undertaking of one man for the debt of another, does not require a consideration moving between them." His Lordship there could not mean what he is reported to have said, but probably intended that it was unnecessary that there should be a beneficial consideration moving to a defendant, who promises to pay the debt of another, and a plaintiff, as a sufficient injury might be sustained by such plaintiff from affording a benefit to such third person at the request of the defendant. So, in *Ex parte Gardom* (*b*), where bankrupts agreed to guarantee the petitioners for whatever twist *T. T.* might purchase from them, and they might dispose of to him; Lord *Eldon* said (*c*), "Until the case of *Wain* v. *Warlters*, he had always taken the law to be clear, that, if a man agreed in writing to pay the debt of another, it was not necessary that the consideration should appear upon the face of the writing, and that it was excessively difficult to distinguish those cases;" but added, "My opinion is, that this is an agreement within the meaning of the statute to pay for the debt of another person." It must therefore be implied, that his Lordship thought it immaterial whether the consideration for the promise appeared on the face of the writing or not. In *Morris* v. *Stacey* (*d*), Lord Chief Justice *Gibbs* seemed to have doubted the propriety of the decision in *Wain* v. *Warlters*, but drew a distinction between the two cases, as it appeared on the face of the letter before him, that in consideration that the plaintiff would take the notes, the defendant would indemnify him, and that the consideration, therefore, was apparent. From these recent

(*a*) 14 Ves. 190.——(*b*) 15 Ves. 286.——(*c*) Id. 288.——(*d*) 1 Holt Ni. Pri. Cas. 153.

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authorities it is perfectly clear, that the doctrine adopted in *Wain* v. *Warlters*, must be restricted rather than extended. In *Goodman* v. *Chase* (*a*), the word "agreement" in the statute, appears to have been considered by Mr. Justice *Abbott* in its popular sense, where he puts the case of a promissory note in these words:—"I hereby *agree* to pay the bearer 20*l*." Would not that be a good negotiable security, and available in law? There, that learned Judge considered the word "agreement" as synonimous with that of "promise." So, in *Egerton* v. *Mathews*, a mere memorandum of the bargain was deemed sufficient. If the word "agreement," in the fourth section, be taken in its strict and technical sense, as embracing the whole of the consideration, then all the decisions in equity enforcing agreements signed by one party only, are unfounded, and improper. In *Bird* v. *Blosse* (*b*), which was decided a few years after the statute was passed, where *A.* wrote a letter, signifying his assent to the marriage of his daughter with *I. S.* and that he would give her 1500*l*., and afterwards, by another letter upon a further treaty, he went back from the proposals of his first, and at some time after declared he would agree to what was proposed in such former letter; it was held to be a sufficient promise in writing within the fourth section of the statute, and that the last declaration had set the terms in the first letter up again. So, in *Moore* v. *Hart* (*c*), where a letter was written by the defendant to a friend of the plaintiff's, in answer to one from him, written at the plaintiff's request; it was held a sufficient memorandum within the provision of that part of the statute respecting promises made by one man for another. That is a much stronger case than *Wain* v. *Warlters*. In *Seton* v. *Slade* (*d*), where the defendant signed a memorandum for the purchase of an estate, it was held good to charge him within the statute, although it was not signed by the plaintiff or any one on his behalf. So, in *Fowle* v. *Freeman* (*e*), it was decided by the Master of the Rolls, that an agreement

(*a*) 1 Barn. & Ald. 300.——(*b*) 2 Vent. 361.——(*c*) 1 Vern. 110. 201. S. C. 2 Chan. Rep. 147.——(*d*) 7 Ves. 265.——(*e*) 9 Ves. 351.

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in writing for the sale of an estate, was binding; though signed only by the vendor; and followed by a direction to his attorney to prepare a proper agreement for both parties to sign. Independently of all the authorities cited, the case of *Bateman* v. *Phillips* (*a*), appears to be decisive of the present. There, the plaintiff gave instructions to an attorney to sue one *Williams* for a debt of 80*l.* upon which the defendant wrote to the plaintiff, as follows:—"Sir, the bearer, *Williams*, has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid." This was signed by the defendant, and the Court determined that such undertaking was evidence within the statute to charge him with the debt due from *Williams* to the plaintiff. That is precisely the converse of the decision in *Wain* v. *Warlters*, and the undertaking is in terms, undistinguishable from the present; for here, the defendant begs the plaintiffs to consider him as security on account of *Coaring* and *Co.* to the amount of 100*l.* and the consideration is sufficiently expressed, as it appears to be their giving such credit to them. It may be further observed, that only one decision in equity was referred to in *Wain* v. *Warlters*, either in the argument or judgment of the Court.

Mr. Serjt. *Hullock*, for the defendant.—The cases of *Ex parte Minet* and *Ex parte Gardom*, merely contain *dicta* of the Lord Chancellor, as impugning the doctrine laid down in that of *Wain* v. *Warlters*, and are irrelevant to the present question. The basis of the argument for the plaintiffs seems to be founded on the assumption, that before the passing of the statute, a parol promise by one person to pay the debt of another, without consideration,—would be good; but it is quite clear, that it would not have made the party promising liable, unless such promise had been founded on a sufficient consideration; and the same rule prevails since the

(*a*) 15 East, 272.

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statute, with this addition, that such promise, and the consideration on which it is founded, must be in writing, and signed by the party to be charged, or his agent. The merely reducing such a promise into writing, will not, of itself render it valid, under the statute. No agreement can be available in law, unless there be some consideration, which necessarily constitutes part of the agreement itself; and as a mere promise to pay the debt of another without any consideration, would, before the statute, have been void at common law, so it is not made good by the statute, without a consideration in law for entering into such an agreement, and which must appear on the face of the instrument. If the defendant's letter had been declared on in the terms in which it was written, it would be bad in arrest of judgment; and the plaintiff has superadded a consideration on the face of the declaration, which should have appeared on the contract itself. So, the mere production of the letter would not have proved the consideration as laid in the declaration; and such consideration could not have been supplied by parol evidence; for the effect of such evidence, if admitted, would be, to render valid that which appears to be by the writing itself void in law, for want of consideration; and this would be letting in all the dangers of fraud and perjury, which it was the object of the statute to guard against. Here, as there is no apparent consideration whatever for the defendant's promise, it might have been given for a gambling or other illegal debt, or for money lent or lost at play, or for goods furnished by the plaintiffs to *Cowing* and *Co.* If parol evidence were admitted, either of those causes of action might be supported; but the express consideration on which such cause was founded, is required by the statute to be reduced into writing. In *Forth* v. *Stanton* (*a*), which was decided before the statute was passed, the plaintiff declared in *assumpsit*, that the defendant's testator was indebted to *I. S.*

(*a*) 1 Wms. Saund. 210.

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who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use; and the defendant, in consideration that the plaintiff would accept him for his debtor, promised to pay it to the plaintiff; and it was held to be an insufficient consideration to support the promise to charge the defendant *de bonis propriis*; and the learned Editor observed (*a*), that "before the statute, a promise by an executor would not make him personally liable, unless a sufficient consideration were stated. So it was since the statute, though such promise be in writing; for the statute has made no alteration in the mode of pleading, and consequently, it does not appear on the face of the declaration whether there was a promise in writing or not; and it is therefore as necessary that a sufficient consideration should be alleged in the declaration, since the statute, as it was before." So, in *Rann* v. *Hughes* (*b*), it was decided, that the statute had not taken away the necessity of a consideration; for that although an executor was not liable personally without a written promise, yet, that such written promise did not render him liable at all events, as the statute was made for the relief of personal representatives, and did not intend to charge them further than by common law they were chargeable. By the words of the statute, a defendant cannot be charged upon any *special promise* to answer for the debt of another. By those words, therefore, it must necessarily be taken, that the consideration on which such promise is founded, must be stated in the agreement; and the case of *Wain* v. *Warlters* is expressly in point, to shew that the word "agreement" must be used in a different sense to that of "promise," and that the former must include the consideration for the latter, as well as the promise itself. The case of *Egerton* v. *Mathews* is inapplicable to the present, as it turned entirely on the 17th section of the statute, and a memoran-

(*a*) 1 Wms. Saund. 211, n. 2.——(*b*) 7 Bro. Parl. Cas. 556. S. C. 7 Term Rep. 350, n.

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dum of a bargain under that section refers to the subject of the contract under which the goods are to be sold, and consequently include the consideration; and Mr. Justice *Lawrence* there drew a distinction between that and the 4th section, and observed (*a*), that "the case of *Wain* v. *Warlters* proceeded on this, that in order to charge one man with the debt of another, the agreement must be in writing; which word "agreement" we considered as properly including the consideration moving to, as well as the promise by the party to be so charged; and that the statute meant to require that the whole agreement, including both, should be in writing." He therefore adhered to his former opinion, in *Wain* v. *Warlters*. In *Lyon* v. *Lamb* (*b*), the same doctrine is laid down as in that case, where it was expressly decided, that the promise alone being in writing is not sufficient, and that it is therefore necessary that the consideration should appear on the face of the written instrument. *Morris* v. *Stacey* bears a strong resemblance to *Stadt* v. *Lill*, as the consideration in the former was expressed on the face of the letter, *viz.* that in consideration that the plaintiff would take certain bills of exchange, the defendant would indemnify him. So, in *Stadt* v. *Lill*, the consideration is to be implied, *viz.* the furnishing goods to *Nicholls*. The observations reported to have been made by Lord *Eldon*, in *Ex parte Minet*, in his reasoning on the case of *Wain* v. *Warlters*, are not intelligible; for he says, that the undertaking of one man for the debt of another, does not require a consideration moving between them. His Lordship does not state whether the consideration need proceed from the party promising or the party benefited; but it must be taken *secundum subjectam materiam*. The general doctrine there adopted is directly contrary to common law; for the distinction is laid down in *Sadler* v. *Hawkes* (*c*), as if *A*. has sold and delivered goods

(*a*) 6 East, 308.——(*b*) Fell on Guarantie, 2nd edit. App. 260.——(*c*) 1 Roll. Abr. 27, pl. 49.

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to *B.*, and afterwards *C.* promises *A.*, in writing, to pay for them, without any consideration, this promise is a mere *nudum pactum*, and void; but if *C.* had requested *A.* to forbear to sue *B.* for the debt, and *A.* had forborne accordingly, that is a good consideration at common law to support such a promise. Besides, in *Ex parte Minet* there was an implied consideration from the words of the instrument, *viz.* the lending of money in future to *Williams* by *Gurney* and *Co.* So, in *Ex parte Gardom*, the furnishing twist to *Tapp* is an implied consideration; as was the furnishing goods by the plaintiff to *Nichols*, in *Stadt* v. *Lill.* *Goodman* v. *Chase* is inapplicable to this case, as it was determined on a different ground; but the principle of the recent decision of the Court of King's Bench in that of *Saunders* v. *Wakefield* must govern the present, and which not only recognised, but confirmed the authority laid down by the former Judges of that Court in *Wain* v. *Warlters*; and in *Saunders* v. *Wakefield*, it was held, that by the fourth section of the statute, an agreement to pay another man's debt, must not only be in writing, but contain the consideration for the promise as well as the promise itself; and that parol evidence of the consideration is inadmissible. In *Bird* v. *Blosse*, and *Moore* v. *Hart*, the letters containing the promises, stated the terms of the agreements. So, in *Seaton* v. *Slade*, and *Fowle* v. *Freeman*, the terms of the contracts were set out in the agreements for the purchase of the estates; on which grounds, a specific performance was decreed. Although in *Bateman* v. *Philips* no consideration was expressed on the face of the letter, still the defendant requested indulgence to be given, which must be taken to mean forbearance; and as the terms of that letter were too general, the Court held, that the amount of the debt and the person to whom it was due, might be explained by parol testimony, as such evidence could not go to extend the terms of the agreement. On principle, therefore, as well as authority, the plaintiffs cannot be entitled to recover.

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Mr. Serjt. *Peake*, in reply.—It is true, that at common law, as well before as since the statute of frauds was passed, there must be a good and sufficient consideration to support an action of *assumpsit*; but previously to that statute, the whole of the promise and consideration might have been given in evidence by parol, and as such proof was productive of fraud and perjury, the object of the statute was, that a promise made by one person to answer for the debt or default of another, should be in writing. Although the words "special promise" are adopted, still the law will only imply a general one; and if a tradesman sell and deliver goods to another, by his order, no direct promise for payment is necessary, as it must be implied that they are to be paid for. All the words used in the fourth section of the statute are synonimous to that of "promise." In the case of *Lyon* v. *Lamb*, the undertaking was bad in itself, as it was founded on a past consideration, and altogether negatived the presumption of a future one. So, in *Saunders* v. *Wakefield*, the promise was founded on a consideration which had passed, for the defendant engaged to pay a bill drawn by *Pitman*, in favor of the plaintiff. Here, however, the letter written by the defendant was addressed to the plaintiffs, and contained the name of the party for whom the defendant was to become responsible, as well as the amount of the sum for which he was to be considered as security, and it also had a prospective operation. If the defendant had added that the plaintiffs were to consider him as security to the amount of 100*l.* for goods to be furnished to *Coxing* and *Co.*, it would fall expressly within the case of *Stadt* v. *Lill*. Although it has been said, that the expression used by Lord *Eldon* in *Ex parte Minet* is indefinite and improper, still, it is quite clear that his Lordship intended that there need be no beneficial consideration as between a defendant and plaintiff, to make the promise of the former binding. As the object of the statute was only to guard a person from being charged by false evidence, with a contract to which he

might be a stranger, it does not follow that the consideration for the promise must be stated in the written memorandum by which he makes himself liable; and if the instrument in this case is to receive the same construction as that in *Wain* v. *Warlters*, it must extend to all contracts whatever, and no promise to pay the debt of another can be considered as valid or binding, unless the whole of the terms for which such promise is made, be fully set out and signed, not only by the party making it, but also by him to whom it is given.

Lord Chief Justice DALLAS.—The question in this case arises on the construction of the 4th section of the statute 29 *Car.* 2. *c.* 3, and has been considered on two grounds, first, as if it were an original question on the construction of that statute, and now arising for the first time; and secondly, as a question affected by a variety of decisions, as explaining the nature and intent of that statute. I shall, therefore, in the outset, consider this case on the first ground, and treat it as if the point had never before arose since the statute was passed. If it turns on the construction of the statute alone, we must have recourse to those rules, by which the intention of the legislature, when doubtfully expressed, has been universally expounded:—It is therefore necessary to consider how the law stood before the statute was passed, and what mischiefs it was intended to remedy. It is agreed, that previously to its being passed, no instrument or memorandum in writing was necessary to prove the validity or consideration of a contract similar to the present, whereby one person undertook to pay the debt of another; and it has been further admitted, that both before and since the statute, a consideration for the promise was necessary, otherwise it would be altogether void. That being the case, and considering the object of the statute, let us next see whether it has introduced any material distinction between a promise and a consideration, so as although it requires the agreement to be in writing, of which the consideration is the most essential part, such considera-

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tion may be established by mere oral testimony. I must confess it appears to me, that this would be a strange construction of the statute, because if the object of it was to prevent the mischiefs of fraud and perjury, it would be completely suppressed, if the consideration for which a promise is given, might be proved by parol evidence, and need not be reduced into writing as well as the promise itself. This, however, will turn on the express enactment of the statute, the fourth section of which provides, that "no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." On the one hand, it has been contended, that "promise" and "agreement," in this section, are synonimous in terms; and that a mere promise or undertaking in writing, executed by one person to pay the debt of another, is, in point of fact, the agreement or undertaking to satisfy such debt. Whether, however, those words can be so considered, will depend upon the construction of the word "promise," which is to be void, unless the agreement on which an action is brought to charge the person making such promise, or some memorandum or note thereof, shall be in writing. On the reason of the thing, it seems to me, that independently of those words, "agreement" or "memorandum," in the latter part of the clause, the same reason exists for having the consideration reduced into writing, as the promise itself; for the consideration is the essential part of the agreement between the parties, and unless such agreement be in writing, a promise by one, to answer for the debt of another, is totally avoided by the statute. Mr. Justice *Lawrence*, in delivering his opinion in *Wain* v. *Warlters*, said (*a*), "If the question had arisen merely on the first part of the clause, I conceive that it

(*a*) 5 East, 10.

would only have been necessary that the *promise* should have been stated in writing; but it goes on to direct, that no person shall be charged on such *promise*, unless the *agreement*, or some *note or memorandum thereof*, that is, *of the agreement*, be in writing; which shews, that the word 'agreement' was meant to be used in a sense different from 'promise,' and that something besides the mere promise was required to be stated. And as the consideration for the promise is part of the agreement, that ought also to be stated in writing." To that distinction I fully accede; but independently of it, the statute itself appears to me to have made a difference between the words "promise" and "agreement;" for in the subsequent part of the clause, the legislature has introduced a word with a meaning entirely different to "promise," *viz.* that of "agreement."

It is impossible to say, that *promise* and *agreement* are the same in their popular signification, since a promise moves voluntarily from one person to another, and an agreement results from the concurrence of the minds of both;—the word *promise* is omitted in the last part of the clause, and that of *agreement* substituted in lieu thereof, and the terms to be particularly attended to in the construction of the whole of the section are, *promise*, *agreement*, and *note or memorandum in writing*. I have before observed, that there appears to me to be an essential distinction between the words "agreement" and "promise." The *agreement* then, which consists of the consent or union of two or more parties to perform one and the same thing, is required to be in writing; and in order to constitute such agreement, there must be a good and valid consideration, which is at all events necessary to support it. So, a note or memorandum of an agreement, must shew the general nature of the agreement itself. By the *memorandum*, it is not necessary to set out all the circumstances in detail that may have been agreed on between the parties, but it must amount to such a note in writing, as to charge the party

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making it, without explaining the consideration for which it was given by oral testimony. Without, therefore, going into the authorities on this point, I am of opinion that the consideration for the defendant's promise does not appear upon the instrument under which the plaintiffs seek to charge him, and consequently, that the terms of the statute have not been complied with. Even if I were to refer to decisions, the weight of authority is in favor of the defendant, on the principle laid down in the case of *Wain* v. *Warlters*, which was recognized in *Lyon* v. *Lamb*, and so recently adopted and established by all the Judges of the Court of King's Bench, in *Saunders* v. *Wakefield*. On these grounds, therefore, I am clearly of opinion, that the agreement, on which a promise by one person to pay the debt of another is founded, in order to give the cause of action here sought to be established, must contain the consideration for the promise, as well as the promise itself.

Mr. Justice PARK.—As I entirely concur with my Lord Chief Justice, in the doctrine he has just laid down, it will be unnecessary for me to enter into this question at any considerable length; but it is a duty the Court owes to the public, to state its reasons for assenting to such doctrine. On looking at the statute, it is impossible to suppose that there could be a special promise without a consideration. Before it was passed, a consideration was necessary to render an agreement valid at common law, and the only object of the statute was to prevent perjury, by providing that the promise should be expressed in writing. It therefore appears to me, that the consideration should be reduced to writing as well as the promise itself. Generally speaking, this seems to be the reason of the thing; for although the rule of law was so far altered by the statute, as to render a memorandum in writing necessary, where parol proof would have been sufficient before, yet, all that was necessary to be proved by parol before, must now appear on the face of the written agreement or memorandum; and it has been admitted,

that there must be a consideration for an agreement, as well previously as subsequently to the passing of the statute. Still, however, it has been contended, that there is no solid distinction to be drawn between the fourth and seventeenth sections. But it seems to me that they are essentially different; for the latter only relates to contracts for the sale of property between vendor and vendee, as it enacts, that "no contract for the sale of any goods, shall be good, unless some note or memorandum of the bargain be made, and signed by the parties to be charged by such contract." The memorandum under that section must therefore shew the consideration, *viz.* the sale of goods; but in the fourth section, which relates to contracts made for the benefit of a third person, the particular consideration must be shewn, for it cannot be known unless it be distinctly expressed; and this appears to be necessary, on attending to all the branches contained in that section. This distinction was taken in *Egerton* v. *Matthews*, which was decided about a year after *Wain* v. *Warlters*. That latter case was determined by Lord *Ellenborough*, and three other eminent Judges; and although it came before the Court on a motion for a new trial, still, it was maturely considered, and they all delivered their opinions at length, and concluded by stating, that the word "agreement" must be understood to mean the consideration for the promise, as well as the promise itself, and that such consideration must appear; but it is not stated how much of it is necessary to be set out. I do not intend to go into the question, whether the decision in that particular case was right or not, as to whether there was a sufficient consideration, but the principle there adopted appears to me to be perfectly correct, *viz.* that the consideration must appear. That was confirmed in terms in *Egerton* v. *Matthews*, and particularly by Mr. Justice *Lawrence*, who adhered to his former opinion. After those cases, came that of *Lyon* v. *Lamb*, which was tried before Mr. Baron *Wood*, at *Lancaster*, in 1807, and afterwards turned into a special case, and argued at considerable length before

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four very learned Judges, *viz.* Chief Baron *Macdonald*, Mr. Baron *Thompson*, Mr. Baron *Graham*, and Mr. Baron *Wood*, who were unanimously of opinion, that the consideration must appear on the face of the instrument, as well as the promise itself. There, the defendant guaranteed all goods *Anderton* had bought from the plaintiff before a certain day, but he stated, that he would guarantee no further; and the Lord Chief Baron, in delivering the judgment of the Court, said (*a*), "A promise may be voluntary, but an agreement, to be binding, must contain a mutual engagement, upon an adequate consideration; and, to prevent frauds and perjuries, within the meaning and scope of the statute, such engagement and consideration should be in writing; otherwise a door is opened to all the evils which the statute was meant to remedy; and as the memorandum, in this case, does not contain, sufficiently, the agreement, we feel obliged to decide against the plaintiff, however reluctantly, because the honesty of the case seems with him; and the probability of there having been a previous request, inducing to the other transactions, as well as the first, is strongly in his favor." In the case of *Saunders* v. *Wakefield*, which was decided in the Court of King's Bench, in the course of the last week, and in which, those of *Ex parte Minet*, *Ex parte Gardom*, and *Fowle* v. *Freeman*, were adverted to, four new Judges of that Court, unanimously determined, that, by the fourth section of the statute, an agreement to pay the debt of another, must, in order to give a cause of action, be in writing, and contain the consideration for the promise, as well as the promise itself. They have thereby recognized and adopted the principle laid down in *Wain* v. *Warlters*; so that it now appears, that twelve Judges have concurred in the same opinion. It has been said, however, that the Lord Chancellor has doubted the propriety of the decision in the latter case; but it must be observed, that the cases before his Lordship did not necessarily affect it, as in all of them, there were considerations apparent on the face of the instruments, as in those of *Stadt* v. *Lill*, *Bateman* v.

(*a*) Fell on Guaranties, 2d edit. 260.

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Phillips, and *Morris* v. *Stacey*. We have also been pressed with the opinion expressed by the late Lord Chief Justice *Gibbs*, in the latter case; but his Lordship there observed, that he did not think it necessary to over-rule the decision in *Wain* v. *Warlters*, and that he considered the undertaking binding, notwithstanding that case. But as the consideration was apparent in *Morris* v. *Stacey*, he might have abstained from mentioning that authority. Here, however, no consideration whatever is expressed, and it is impossible to say whether the defendant's promise was made for money to be lent, or goods to be delivered, or whether it was intended to cover a gambling debt, or any other transaction of an illegal nature. For these reasons, therefore, I think the plaintiffs are not entitled to recover.

Mr. Justice BURROUGH.—The decision of the Court in *Wain* v. *Warlters* has given rise to various discussions since it was given; but Mr. Justice *Lawrence*, in *Egerton* v. *Matthews*, continued of the same opinion, and the principle of the former case has since been confirmed by the Court of Exchequer, as well as by four new Judges of the King's Bench. Here, however, it is not necessary to advert to the facts of that case, but we may act on the principle there laid down, which is, that the substance of the agreement must be stated in the memorandum for a promise, to render a person liable for the debt of another. The words of the statute are, that "a defendant cannot be charged upon any 'special promise,' to answer for the debt of another, unless the agreement upon which the action is brought to charge him, or some memorandum thereof, be in writing." The agreement must disclose the ground of such special promise, otherwise a mere general promise would suffice. The consideration is the proof of the promise, and prevents its being a mere *nudum pactum*, and such consideration is the most material part of the substance of the agreement, which in point of fact amounts to nothing without it. It there-

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fore seems to me, that on the construction of the statute alone, the consideration ought to appear on the face of the instrument. Here, there is nothing to shew for what consideration the promise was made. It might have been for goods sold, money lent, or on an account stated; and if either of those had been the consideration for the promise and given in evidence at the trial, it would have been a variance from the substance of the declaration. The terms of the agreement should have appeared at all events; and as the principle adopted in *Wain* v. *Warlters* has been sanctioned and approved of by twelve Judges, it would be too much for us now to say, that they were all mistaken in the law on the subject. For myself, I must confess that, although the Lord Chancellor might have entertained a different opinion, I should be disposed to adopt that which has been acted upon in the courts of law. This case, however, may be decided independently of that of *Wain* v. *Warlters*, as the declaration cannot be supported by the written undertaking of the defendant, the terms of which do not render him liable on his promise to the plaintiffs.

Mr. Justice RICHARDSON.—The object of the statute of *Charles* was to prevent frauds, by perjury, or subornation of perjury, by causing that to be reduced into writing, which before might have been proved by parol testimony. The fourth section enacts, that "no action shall be brought, whereby to charge a defendant upon any special promise to answer for the debt of another person, unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith." The Court ought to put such a construction on this clause, as will best effectuate the purpose and intention of the legislature. The question then is, whether the letter written by the defendant in this case, is such a note or memorandum as will satisfy the terms of that enactment? On the face of it, it is ambiguous and

doubtful, and it does not appear whether the defendant meant to be security for *Cowing* and *Co.*, for a past or a future consideration, or in point of fact, whether there was any consideration whatever. It might have applied to either, for if they were indebted to the plaintiffs, it might have been worded in the same terms, and it is equally applicable to a debt about to be created. So, it might apply to money lent—or to be advanced;—to goods sold—or to be delivered,—or even to an illegal debt. As, therefore, it is wholly silent as to the consideration for the promise, whatever is necessary to render it available, must be supplied by parol evidence. The declaration states, that the promise was given, in consideration that the plaintiffs would sell and deliver goods on credit to *Cowing* and *Co.* for which the defendant undertook to be liable to the amount of 100*l.* If the memorandum was given in evidence, and the consideration appeared on the face of it to be for goods to be sold to *Cowing* and *Co.*, and the plaintiffs, instead of supplying goods, had advanced money to them, that would not have fallen within the intention of the guarantie, which was in its terms confined to goods alone. But if the memorandum can be deemed sufficient in its present terms, parol evidence might be admitted to shew whether it applied to goods or money, and the effect of such evidence would be to open a door to that subornation of perjury which it was the object of the statute to prevent. The section requires, that the agreement, or some memorandum thereof, should be in writing; that is, that the substance of the cause of action should be reduced into writing; and that cannot be done, unless the consideration is expressed, for the consideration is the essence of the agreement. The legislature did not require the whole of the agreement to be in writing; they thought it unnecessary to be set out in detail, as it might be productive of difficulty, and therefore allowed a memorandum or note thereof to be deemed sufficient, which, although it might be loosely worded, should still disclose the real substance of the cause of action. This

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was the opinion of the Court in *Wain* v. *Warlters*. So, in *Stadt* v. *Lill*, and *Bateman* v. *Phillips*, it was determined that the agreement need not appear in detail, but that there must be a memorandum in writing, which must in some measure or other, point out the consideration for which the action is commenced. I agree with my Brother *Park*, that it is not necessary for us to give any opinion as to whether a consideration appeared on the face of the instrument in *Wain* v. *Warlters*, but that we may decide on the principle there contained, *viz.* not only that the promise must be in writing, but further, that the consideration for the promise must be shewn. What may be a sufficient disclosure of the cause of action, is a mere matter of fact. In *Stadt* v. *Lill*, the Court considered that there was an implied request from the defendant to the plaintiff to furnish goods to a third person, as the defendant guaranteed the payment of any goods which the plaintiff should deliver to such person. So, in *Bateman* v. *Phillips*, the consideration was apparent on the face of the letter, and the Court thought that the parol evidence there offered did not go to extend the terms of the agreement, but only explain them, and that it imported, that if the plaintiff would grant indulgence to a third person until a certain day, the defendant undertook to see him paid. It has been urged, however, by my Brother *Peake*, that in *Egerton* v. *Matthews*, a different construction was put on the seventeenth section of the statute than on the fourth; but I think not; nor is it necessary for me to express any opinion as to this point, for in that case, the cause of action appeared on the instrument itself, by which the defendants agreed to give the plaintiff 19*d. per* pound for thirty bales of *Smyrna* cotton, customary allowance, cash three *per cent.*, as soon as their certificate was complete. That was a memorandum of the *bargain*, and had a prospective view to give that sum for the cotton to be sold to them, after they had obtained their certificate. The words of the seventeenth section are, that "no contract for the sale of any goods, for the price of 10*l.*

or upwards, shall be good, except the buyer give something in earnest to bind the bargain, or that some note or memorandum in writing, of the said bargain, be made and signed by the parties to be charged by such contract."

If a person in a warehouse were to make a bargain for the purchase of goods of above 10*l.* value, and give as a memorandum, "I will pay *A. B.* 50*l.*," I do not think that it would be a sufficient memorandum of the bargain under that clause, as it would be necessary to bring forward parol evidence to shew, that such sum was to be paid for goods sold; but, in *Egerton* v. *Matthews*, the consideration for the promise was sufficiently pointed out; and it must be inferred from the opinions there expressed by Lord *Ellenborough* and Mr. Justice *Lawrence*, in which the other Judges of the Court concurred, that they did not intend to impugn or cast a doubt on their former decision in *Wain* v. *Warlters*, but that that case was distinguishable from it. So, in *Lyon* v. *Lamb*, the Court of Exchequer thought that the principle laid down in *Wain* v. *Warlters* was perfectly right; and in the very recent determination of the Court of King's Bench in *Saunders* v. *Wakefield*, and which bears the nearest resemblance to the present, the former doctrine was most fully adopted. There, the memorandum was much more expressive of the consideration than in the present case, as the defendant engaged to pay a particular bill, drawn by a person in favor of the plaintiff. With respect to the *dicta* of Lord *Eldon*, it does not seem to me that there has been any direct decision by his Lordship, contradicting the principle of the doctrine adopted in *Wain* v. *Warlters*, although he unquestionably used very strong expressions, and seemed to entertain a doubt as to its authority. The cases of *Bird* v. *Blosse*, and *Moore* v. *Hart*, are inconsistent with it, as the promises were made in consideration of marriage. So, in *Seaton* v. *Slade*, and *Fowle* v. *Freeman*, where specific performances were decreed for the completion of the sale of an estate, the agreements had reference to the estate sold, as well as the

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price to be given for it. It was not decided in *Wain* v. *Warlters*, nor has it been since held, that it was necessary that the memorandum of the agreement should be signed by both parties; for the fourth section of the statute only requires the signature of the party charged. Here, as the letter written by the defendant does not disclose whether the promise was made by him for a past or future consideration, nor the cause for which it was given,—if parol testimony were allowed to explain either of those circumstances, it would let in the mischief which it was the express object of the legislature to obviate and prevent, when the statute in question was passed.

Judgment of nonsuit.

Thursday, July 5.

WORTON and two Others *v.* SMITH and Another.

In a joint action for a libel by three plaintiffs, the defendants may call on the attorney of one of them for an account of the residence or occupation of the others.

THIS was an action on the case for a libel, to which the defendants pleaded Not Guilty.

Mr. Serjt. *Hullock*, on a former day in this Term, obtained a rule, calling on the attorney for the plaintiff *Worton* to shew cause why he should not disclose the particulars in writing of the places of residence and occupations of the other two plaintiffs to the defendants, or their attorney, and that in the mean time all further proceedings in the action might be stayed. He founded his motion on an affidavit, which stated, that the defendants had made several enquiries to discover those plaintiffs, but without success; that they were wholly ignorant of their places of abode, or their avocations; and that the attorney of *Worton*, on being applied to, had refused to give them any information on the subject.

The learned Serjeant submitted, that if the defendants knew the residences or occupations of those plaintiffs,

they might plead a justification, or be entitled to prepare their defence to the action, which they could not do, provided they were to remain in ignorance.

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And on this day, no cause being shewn, the rule was made

Absolute (*a*).

(*a*) See Tidd's *Practice*, 7th edit. 551. *Gynn* v. *Kirby*, 1 Str. 402. *Braceby* v. *Dalton*, ibid. 705. *Taylor* v. *Harris*, 4 Barn. & Ald. 93.—*Johnson* v. *Birley*, 5 Barn. & Ald. 540. S. C. 1 Dow. & Ryl. 174.

COLLINS *v.* SNUGGS.

Thursday, July 5.

Where a sheriff's officer, on arresting the defendant, took five shillings from him, with a promise to pay the remainder of what was usual at a future day, and allowed him to go at large without taking a bail-bond, without the plaintiff's assent, he cannot be surrendered in discharge of his bail; and an attachment having issued against the sheriff for not returning the writ, it cannot be set aside, nor will the Court relieve him by allowing him to put in and justify bail.

MR. Serjt. *Pell* on a former day in this Term, had obtained a rule *nisi* that the defendant might be surrendered in discharge of his bail; on an affidavit of one of the Serjeants-at-Mace to the Sheriffs of *London*, which stated, that on the 16th *May* last, he arrested the defendant; but as he had done on other occasions, took his word for doing what was necessary in this action, whereupon the defendant gave him five shillings, and promised him the remainder of what was usual, at a future day; that the sheriffs had not returned the writ, and that the defendant was a prisoner in the King's Bench; and that unless he was surrendered in this action, he (the officer) would be obliged to pay the debt and costs.

Mr. Serjt. *Onslow* afterwards shewed cause on affidavits, which stated, that the defendant had given the officer five shillings, on which he allowed him to go at large, without taking a bail-bond, but that such officer had nevertheless

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stated to the plaintiff, that he had never seen the defendant, nor had he been able to find him.

The Court, on the authority of the case of *Fuller* v. *Prest* (*a*),

Discharged the rule, with costs.

An attachment having afterwards issued against the sheriffs for not returning the writ;

Mr. Serjt. *Taddy* moved, that it might be set aside, and that bail might be put in and justified.

Mr. Serjt. *Lawes* now shewed cause, and opposed the justification, on the authority of *Fuller* v. *Prest*, where a similar application was refused; and he cited the case of *The King* v. *The Sheriffs of London* (*b*), where the Court refused to set aside an attachment against the Sheriff for not bringing in the body on payment of costs, on the application of the defendant, who swore to merits, where it appeared that no bail-bond had been taken by the sheriff; and the Court considered that it was in reality an application by the Sheriff's officer, he being the only person interested in setting aside the attachment.

The Court being clearly of opinion that these cases were conclusive, and that the sheriff's officer had acted contrary to his duty as such, refused to set aside the attachment, nor would they allow the bail to justify as prayed for.

Rule discharged.

(*a*) 7 Term Rep. 109.——(*b*) 2 Barn. & Ald. 354.

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ADAMS, Gent. one, &c. *v.* LUCK.

Thursday, July 5.

Where an attachment of privilege was made returnable after the *essoign* day, and before the *quarto die post*, instead of a day certain in full Term; the Court allowed it to be amended on payment of costs by the plaintiff, and those of the application by the defendant to set it aside.

MR. Serjt. *Vaughan*, on a former day in this Term, had obtained a rule calling on the plaintiff to shew cause, why the writ of attachment of privilege, which had been issued by him against the defendant in this cause, might not be set aside for irregularity, with costs, and the bail-bond which had been given by the defendant, delivered up to be cancelled, on the ground of irregularity in the return of the writ; it being made returnable after the essoign day, and before the *quarto die post*, instead of being returnable on a day certain in full Term. He relied on the cases of *Mills* v. *Bond* (*a*), where it was held that original process returnable out of Term, avoided a bail-bond taken on it; and *Kenworthy* v. *Peppiat* (*b*), where the Court decided, that a writ returnable on a *dies non*, was altogether void, and could not be amended.

Mr. Serjt. *Hullock* now shewed cause, and submitted that the writ should have been returned and before the Court, previously to this motion being made, for in *Perrot* v. *Hele* (*c*), Mr. Justice *Yates* said, that "you cannot take any advantage of the irregularity of process, without having it returned, and before the Court, which in that case it was not; and that the Court would not, on a motion to have the writ returned, have made any rule for that purpose." But, at all events, the Court would allow the writ to be amended, as was done in *Walker* v. *Hawkey* (*d*), where a writ of *capias ad respondendum*, which was made returnable on a day certain, instead of a general return day, was permitted to be amended, even after a rule *nisi* had been obtained to quash it for irregularity.

(*a*) 1 Str. 399.——(*b*) 4 Barn. & Ald. 288.——(*c*) 3 Wils. 58.
(*d*) 1 Marsh. 399. S. C. 5 Taunt. 853.

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Mr. Serjt. *Vaughan*, in support of the rule, submitted, that it was too late to amend the writ, which was in itself a nullity.

But the Court discharged the rule, and permitted the plaintiff to amend the writ on payment of the costs of such amendment, and of this application.

Thursday, July 5.

BRAGG and Another, Executors, &c. *v.* COLE.

Where the defendant agreed to purchase a lot of trees for a certain sum, and pay for the same according to conditions of sale, and afterwards felled and carried away part of them without making such payment, and refused to pay until the remainder had been delivered:—Held, that the executors of the vendor having failed to establish a count on the special contract, might recover the value of the trees taken by the defendant under counts for goods sold and delivered, as the defendant, by such taking, had disaffirmed the entirety of the contract.

THIS was an action of *assumpsit*, brought by the plaintiffs as executors of the Rev. Dr. *Adney*, to recover from the defendant the value of certain ash trees sold to him in the lifetime of the testator. The first count of the declaration stated, that on the 21st *March*, 1811, Dr. *Adney* caused to be put up to sale by public auction, divers timber trees, in divers lots, subject to, among other conditions, that the purchaser of each lot should pay a deposit of 10*l. per cent.* in part of his purchase money, and pay the remainder into the *Bridport* bank on the 7th *September* then next, or that he should pay a moiety to the seller himself on that day, and the remainder at *Christmas* following; and that the purchasers should fell and cut down all the timber in a fair and usual way, before the 1st *December* then next, and carry away the same through the usual paths. The plaintiffs then averred, that the defendant became the purchaser of one of the lots, containing ten ash trees, for the sum of 35*l.* and afterwards felled and carried away divers of them, and disposed of the same to his own use;—and assigned for breach, that he would not pay a deposit of 10*l. per cent.* in part of

his purchase-money, nor did he pay the residue, or any part thereof, into the *Bridport* bank on the day in the conditions mentioned, or at any other time, either to the testator in his life-time, or to the plaintiffs as his executors, since his death. The declaration also contained counts for trees sold and delivered by the testator before his death; and the common money counts. There was a second set of counts, laying the promises to the plaintiffs as executors. The defendant pleaded, first, *non-assumpsit*, and secondly, *actio non accrevit infra sex annos*, on both of which, issue was joined.

At the trial of the cause before Mr. Justice *Holroyd*, at the last Assizes at *Dorchester*, it was proved, that the defendant agreed to purchase ten ash trees, being lot 22, as expressed in the conditions of sale, for 35*l.* and that he signed such conditions accordingly, but that they were not bought at the sale, but sold to him by the auctioneer the same evening, when it was over, by private contract; that the defendant afterwards cut down seven of the trees, and carried them away in *June* 1814, and that he had never paid for them; that Dr. *Adney* died in 1815, and that in 1818 the defendant, on being applied to by a person who rented an estate under Dr. *A.*, for the payment of the trees, the former confessed that he had never paid for them, and said, "he would not pay for any part of them, until he had taken away the whole:"—on which the tenant informed him, that "if he paid the money into the *Bridport* bank, he might take the three remaining trees as soon as he pleased." The conditions of sale contained a proviso, that in case default should be made in payment of the purchase-money, or any part thereof, by any purchaser, according to the terms of the conditions, then the seller or his agent might retain the whole of the timber so unpaid for, if then on the premises; and if removed therefrom, to follow and take the same, and the same again to re-sell or dispose of by auction or private contract, as he might think proper; and with the monies to

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arise therefrom, to pay and satisfy the seller the monies then remaining due, and the costs and expences attending the re-taking and re-selling of such timber; and that if any deficiency should remain, the same should be paid by the purchaser so making default in payment. On its being proved that the trees were not purchased at the sale, but shortly afterwards by private contract; the first count of the declaration was abandoned; when it was objected for the defendant, that the plaintiffs could not recover on the other counts, as there was no delivery by the vendor, and that the contract was entire and could not be severed; and consequently, that the defendant could not be deemed liable to pay for any of the trees before he had taken the whole of them away. It was also objected that this case came within the fourth section of the statute of Frauds, as it was an agreement for an interest in land, and therefore that the plaintiffs could not recover on counts for trees sold and delivered by the testator in his life-time.

The learned Judge at first thought that the plaintiffs could not recover on those counts, but observed, that a delivery might be satisfied, by the vendor's allowing part of the trees to be cut down and carried away by the defendant; that the contract was not within the statute, it being for a chattel interest only; and he referred to the case of *Parker* v. *Staniland* (*a*). It was also proved, that the value of the trees taken by the defendant amounted to 23*l.* and the Jury found a verdict for the plaintiffs for that sum, but leave was given the defendant to move to enter a nonsuit, if the Court should be of opinion that the above objections were well founded.

Mr. Serjt. *Lens*, in the last Term, having accordingly obtained a rule *nisi*,

Mr. Serjt. *Pell* and Mr. Serjt. *Lawes* now shewed cause. The justice of the case is most clearly in favor of the plain-

(*a*) 11 East, 362.

tiffs, for the defendant took away seven of the trees, which he never paid for, and the vendor or his executors were warranted in refusing the delivery of the remaining three, until they had been satisfied for those which had been removed. As they were not sold at the auction, there was no stipulated time when they were to be paid for, and a constructive delivery is sufficient to satisfy the statute of frauds. When the seven trees were cut down by the defendant, they became his property, and if reference be made to the terms of the conditions, they do not afford any evidence of an entire contract, for the payments were to be made at different times, and so might the delivery, and the trees were to be cut and carried away at the expence of the purchasers. The case of *Chaplin* v. *Rogers* (*a*) is expressly in point to shew that there was a delivery to the defendant, for it was there held, that after a bargain and sale of a stack of hay between the parties on the spot where the stack stood; evidence that the vendee actually sold part of it to another person (by whom, though against the vendee's approbation, it was taken away), is sufficient to warrant the Jury in finding a delivery to, and an acceptance by the vendee, so as to take the case out of the statute. So, in *Groning* v. *Mendham* (*b*), where a plaintiff having received an order from the defendant for goods, shipped them, and transmitted to him the bill of lading, indorsed, making the goods deliverable to order or assigns, and on their arrival the captain withheld the goods in consequence of the defendant having refused to accept a bill drawn on him for the price; and thereupon the defendant recovered in trover against the captain; it was determined that the plaintiff might have an action for goods sold and delivered, for the delivery of the goods was complete as between him and the defendant, by the delivery on board the ship;" and Lord *Ellenborough* there observed (*c*), "Suppose this had been a delivery into the warehouse of the vendee, and the goods

(*a*) 1 East, 192.——(*b*) 5 Maul. & Selw. 189.——(*c*) Id. 190.

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had afterwards been wrongfully taken away by the vendor, that would not have destroyed the vendor's right of action as for goods sold, though it might have afforded the vendee a cause of action of another sort, as for the tortious taking."

Mr. Serjt. *Lens*, in support of the rule.—The only question in the present case turns on the entirety of contract. The plaintiffs having failed in proving the special contract as declared on, according to the conditions of sale, they cannot recover for goods sold and delivered, by apportioning the sum to be paid for the trees that were taken away. The trees were purchased as one lot, and each of them might be of a different value. The plaintiffs therefore, cannot recover *pro rata*, as for goods sold and delivered, but as the bargain or contract was in itself entire, they can only recover against the defendant for a breach of that contract.

Mr. Justice PARK (*a*).—I am of opinion that the verdict found by the Jury was right, and ought not to be disturbed. If we were to decide on the terms comprised in the conditions of sale, it does not appear to me that the contract must of necessity be considered as entire; for they contained a proviso that it might be opened under circumstances, namely, "that in case default should be made in payment of the purchase money, or any part thereof, by any purchaser not acceding to the terms therein stipulated, then the seller might retain the whole of the timber so unpaid for, if then on the premises; and if removed therefrom, might follow and take the same, and re-sell it by auction or private contract, as he might think proper; and that if any deficiency remained, the same should be paid by the purchaser so making default in payment." The parties, therefore, contemplated what has happened in this case. Independently, however, of any default by Dr.

(*a*) Lord Chief Justice *Dallas* was absent at the Cockpit, where he attended as Privy Counsellor, to consider the nature of the late Queen's claims.

Adney in his life-time, it is a strong argument to shew that the defendant did not consider the contract as entire; for he felled and took away seven of the trees, and constantly refused to pay for them. I therefore think, that the plaintiffs, as his executors, were justified in refusing the delivery of the remaining three trees, until the others were paid for; and that the Jury were warranted in finding a verdict for them for the amount of those which were taken away.

Mr. Justice BURROUGH.—As the defendant neglected to pay for the trees according to the terms of the agreement, and afterwards took seven of them away, I think he thereby abandoned the entirety of the contract.

Mr. Justice RICHARDSON.—The contract was at first entire. If the seller had withheld the delivery of the trees in the first instance, the plaintiffs would not have been entitled to recover. But the fault rests entirely with the defendant as purchaser. He was bound to pay for the trees according to the terms of the agreement; and after he had taken away seven, which he did not pay for, he still refused to pay until the delivery of the three others. It would be too much to say that he can keep those he received, without making any payment whatever for them. It appears to me, that the contract is complete as to those, and that it was entirely owing to the fault of the defendant that the others were not taken away. On the whole, therefore, I concur with the Court in thinking, that a promise in law results from the defendant to the plaintiffs as executors of the seller, for the payment of those trees cut down and carried away by him, and consequently, that they are entitled to recover.

Rule discharged.

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Friday, July 6.

Francis v. Neave, Bart.

In an action against the sheriff for not arresting a defendant; proof of the indorsement of the officer's name on the writ, by a clerk in the under-sheriff's office, is sufficient to connect such officer with the sheriff, and shew that the indorsement was made with his authority, without calling the officer himself, or producing the warrant under which he acted.

This was an action brought against the defendant, as late sheriff of the county of *Essex*, for not arresting a person by the name of *Hurrell*, after four warrants had been delivered to one of his bailiffs for that purpose. The first count of the declaration stated, that the plaintiff sued out a writ of *non omittas capias ad respondendum* against *Hurrell*, directed to the defendant as such sheriff, under which he was arrested; but that the defendant afterwards voluntarily permitted him to escape. The second count was for not arresting *Hurrell*. There were two other counts, which were similar in substance to the first and second; and the defendant pleaded Not Guilty.

At the trial of the cause before Mr. Baron *Wood*, at the last assizes at *Chelmsford*, in order to connect the defendant with the officer who ought to have arrested *Hurrell*, an examined office copy of the writ was produced, with the name of such officer indorsed thereon. It was proved by a clerk to the plaintiff's agent, that he had applied at the sheriff's office for a warrant on the writ; that he directed the under sheriff to insert the name of the officer in the warrant; and that he received the warrant, so directed to the officer, from the under sheriff; and that he sent it by the same post to such officer. The sheriff's return of *non est inventus* was also proved. The witness who produced the writ, stated that he belonged to the sheriff's office; that the writ was received there from the plaintiff's agent, indorsed with the name of the officer; and that he directed the name of such officer to be written on it a second time, which was accordingly done; and it appeared that both these indorsements had been made on the writ, and that the name of the person so indorsed was one of the defendant's officers. For the defendant, it was insisted, that this evidence was not sufficient to connect him with the officer, but that the original warrants ought to have

been produced; or that at all events, the officer should have been called to produce those warrants, pursuant to a *subpœna duces tecum*, which had been served upon him by the plaintiff for that purpose; and the case of *Hill* v. *The Sheriff of Middlesex* (*a*), was relied on, where it was decided, that an examined copy of a writ returned and filed, and of the indorsement thereon, on which writ was indorsed, apparently by the sheriff's authority, the name of the bailiff appointed to make the levy; was not evidence to prove who was the bailiff so employed by the sheriff, unless evidence were adduced, that the indorsement of the bailiff's name on the writ itself was made by the sheriff's authority.

The learned Baron, however, over-ruled the objection, and thought, that the officer was sufficiently connected with the sheriff by the testimony of the witness who was in his office, and who produced the writ with the name of the former indorsed thereon; and the Jury accordingly found a verdict for the plaintiff.

Mr. Serjt. *Taddy*, in the last Term, had obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, and insisted, that the defendant could only be connected with the execution of the writ, by shewing that he had authorised the officer, whose name was indorsed on it, to put it in force; that it did not appear when the indorsements in question were made; and that it was therefore necessary either for the warrants to have been produced, or the officer himself called, as parol evidence of indorsements was not admissible as to the contents of the warrants, as they ought to have been in the possession of the officer, and not of the defendant, and the former should therefore have produced them, in order to shew that he was the person who was required by the plaintiff's agent to execute the writ. In *Jones* v. *Wood* (*b*), it was held by Lord *Ellenborough*, that in an action against the sheriff for a false return, to connect him

(*a*) 7 Taunt. 8. S. C. 1 Holt Ni. Pri. Cas. 217.——(*b*) 3 Camp. 226.

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with the acts of a particular officer in the execution of the writ, it is not enough to shew that this officer's name was written in the margin of an examined copy and return :—and although it was there decided, that without producing the warrant, it was enough to give in evidence a paper issued from the sheriff's office, and directed to such officer, requiring him to give instructions for making a return to the writ, still, such paper amounted to a clear recognition by the sheriff, that the person it was directed to, was the person to whom the execution of the writ had been entrusted. So, in *Fonsec* v. *Magnay* (*a*), it was determined, that in an action against the sheriff for not arresting, it was not sufficient evidence to connect him with his officer, that the name of the latter appeared on the writ, and that it had been returned *non est inventus*;—the sheriff having gone out of office before the return.

Mr. Serjt. *Pell* being now about to shew cause,

The Court called on Mr. Serjt. *Taddy*, to support his rule, who submitted, that although the fact of a person's being the bailiff to whom a warrant has been delivered to be executed, has often been proved by producing the writ with his name indorsed thereon, and by evidence that such name had been inserted by some one in the sheriff's office authorised so to do, still, that here it does not appear when or by whom it was done, as the witness who produced the writ stated, that he had directed it to be indorsed a second time. That might have been done without the authority or sanction of the sheriff, and the case of *Hill* v. *The Sheriff of Middlesex* is precisely in point.

Mr. Justice PARK (*b*).—I am of opinion that upon the evidence of the witness who produced the writ, and who held a situation in the sheriff's office, there is sufficient to

(*a*) 1 Marsh. 554. S. C. 6 Taunt. 231.——(*b*) Lord Chief Justice *Dallas* was again absent at the Cock-pit.

connect the defendant as such sheriff, with the indorsement on the writ. If an indorsement be made by a person having received authority from the sheriff, there can be no doubt but that it is sufficient; and it appears to me that the Court is in this case fully warranted in drawing that conclusion; for the witness proved that the officer to whom the writ was directed was one of the officers of the under sheriff; that it was customary for all clerks in his office to indorse the name of the officer on the writ by whom it was to be executed; that he himself had directed it to be done in the present case, and that it had been inserted accordingly. This seems to me to be *primâ facie* evidence that the name of the officer was written on the writ with the authority of the under sheriff.

Mr. Justice BURROUGH.—In the late case of *Bowden* v. *Waithman* (*a*), which was an action against the sheriff to recover penalties for the extortion of his officer, and which was tried before me, I thought that the name of the officer on the writ was sufficient to connect him with the sheriff, without shewing that such indorsement was made with his authority; and the Court afterwards sanctioned that opinion. So, in *Fermor* v. *Phillips* (*b*), although the officer was called, still, it did not carry the case further; for he had parted with the warrant, and therefore, in point of fact, could prove nothing. These cases appear to me to be not only in point, but decisive of the present.

Mr. Justice RICHARDSON.—In *Hill* v. *The Sheriff of Middlesex*, it was admitted, that the practice of proving the particular bailiff to whom a warrant had been delivered to be executed, was to produce the writ with his name indorsed on it, and give in evidence that such name had been indorsed by some person in the sheriff's office, authorised to do so, at the time the warrant was returned. There, the plaintiff only produced an examined copy of the

(*a*) Ante, vol. v. Page 183.——(*b*) Id. 184, n.

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writ, which had been returned *non est inventus*; but there was no evidence that the name indorsed on it was written by any person authorized so to do; and Lord Chief Justice *Gibbs* therefore held, that this copy of the writ and return, was no evidence to prove that the warrant was made to that particular bailiff. So, in *Jones* v. *Wood*, Lord *Ellenborough* thought, that the mere indorsement of the name of the officer on the writ was insufficient to connect him with the sheriff; but that it was enough to give in evidence a paper issued from the sheriff's office, directed to such officer, containing instructions for making a return to the writ, without producing the warrant. The rule has invariably been acted upon, that if there is any proof of an authority to put the name of the officer on the writ, it is sufficient; and here, it appears to me, that there was sufficient proof for such authority, as it was proved by the person who produced it, that he belonged to the sheriff's office, and directed the name of the officer to be indorsed on it, and which was accordingly done.

Rule discharged.

Monday, July 9.

HUNN, Executor, &c. *v.* BRINE.

The clerk of the dockets is not entitled to poundage on money paid into Court by the sheriff under the statute 43 *Geo.* 3. *c.* 46. *s.* 2.

THE defendant, on being arrested in this cause, in the last vacation, paid to the sheriffs of *London* the sum of 3000*l.* for the debt, and 10*l.* for the costs, under the statute 43 *Geo.* 3. *c.* 46. *s.* 2., in lieu of giving a bail-bond;—both of which sums, the sheriffs, at the commencement of this Term, paid into Court; and the defendant having put in and justified bail, obtained a rule, that such sums might be paid out to him or his attorney;—which, on no cause being shewn, was afterwards made absolute. On application by

the defendant's attorney to the clerk of the dockets, for the re-payment of those sums, he claimed to retain 25*l*., being the amount of poundage stated to be due to him by immemorial usage, on all monies paid into Court, which the defendant objected to pay, on the authority of *Stewart* v. *Bracebridge* (*a*); and the only question now was, whether the officer was entitled to deduct that sum.

Mr. Serjt. *Vaughan*, for the defendant, insisted that he was not, and made the same distinction as was taken by the Court of King's Bench, in *Stewart* v. *Bracebridge*, *viz.* that poundage is only payable where the defendant pays money into Court *at his own request*; that, in the present instance, it was not paid in voluntarily by him, but by the sheriffs under the act of Parliament, by which it is enacted, that the sum of money deposited by the defendant with the sheriff, is to be re-paid to the defendant, and that the statute contains no provision as to claims made by the clerk of the dockets for poundage, or other fees. Although in that case, the officer of the Court of King's Bench claimed to be entitled to this fee under the rule 5 *Jac.* 1., still, here, there is no rule or order of Court; but it is stated, that the right of the officer to claim it rests upon constant and ancient usage. That, however, does not establish such claim, as the right of the officer to retain such fee, must depend on the terms of the statute 43 *Geo.* 3. *c.* 46., which was passed in ease of the subject, and must therefore receive a liberal construction.

Mr. Serjt. *Lens*, for the officer of the Court, now shewed cause in the first instance, and submitted, that the principle of allowing poundage was a remuneration to the officer for his responsibility, which holds as strong in this case as in any other; that although the statute 43 *Geo.* 3. was made in favor of defendants, still, they were not compelled to pay the debt and costs to the sheriff, but that it was entirely optional

(*a*) 2 Barn. & Ald. 770.

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whether they would do so, or give bail to him, and that he was merely an instrument by which the money was paid into Court; that the legislature contemplated costs attending the payment of money into Court under that statute, by ordering 10*l.* to be paid towards them, and if that sum was insufficient, by enabling the plaintiff to appear for the defendant, and proceed in the action for their recovery. That this case could not be governed by *Stewart* v. *Bracebridge*, as there the officer claimed his fee under a particular rule of Court, by which 20*s.* *per cent.* was ordered to be paid to the chief clerk, by every party paying money into Court. Here, however, it appears, that in a return made to the House of Commons by the several officers of this Court, in the year 1730, among other fees claimed by the clerk of the dockets, as being ancient fees, were the following, *viz.* "For paying money out of Court, *per* pound, 2*d.*; for the receipt, 1*s.* 4*d.*;" which fees had been received by him in all cases without exception since that return was made. The defendant alone is benefited by the payment of money into Court; and although, in the present instance, he himself does not deposit it there, still, it is in fact paid on his account alone, and at his request; for the payment by him to the sheriff in the first instance, is not compulsory, but altogether voluntary, and it is through his medium paid in on account of the defendant.

Mr. Serjt. *Vaughan*, in reply, submitted, that the return made to the House of Commons, in 1730, did not apply to this case, as it merely recognized a fee to be taken by the officer, for money paid into Court as between party and party; that here, the question depended on the construction of the statute 43 *Geo.* 3., which had been most properly considered by the Court of King's Bench, in the late decision in *Stewart* v. *Bracebridge*.

Lord Chief Justice DALLAS.—I should, for one, be extremely unwilling, in a case of this description, where cause

has been shewn in the first instance, if it appeared to be the least doubtful, that the Court would break in upon, or deprive one of its officers of a certain fee, which he claims to be due to him, and established by ancient usage and practice. Although such fee may have been invariably taken since the return to the House of Commons in 1780, still, the present claim will not turn on such custom and usage, but on the terms of the statute 43 *Geo.* 3. *c.* 46, the second section of which has expressly directed what sum shall be paid into Court by the sheriff, *viz.* the sum of money deposited with him by the defendant, and that in case he shall afterwards put in and perfect bail, the sum so deposited shall be re-paid to such defendant. There is nothing in the words of the statute which shews that the money shall be paid out of Court, upon payment of costs or of poundage to the sheriff, nor is there any thing which authorizes such a deduction or reservation to be made as is now claimed by the officer. This case, therefore, appears to me to be undistinguishable from that of *Stewart* v. *Bracebridge*, and although the claim was there made as being founded on a rule of Court, still, that rule ordered that poundage should be paid by every party *at whose request* any sum of money should be paid into Court. There, too, the Court laid down the rule, which appears to me to be the proper construction of the 43 *Geo.* 3., and held, that their officer was not entitled to the poundage which is claimed to be deducted in this case. Therefore, not only on the construction of the statute, but on the authority of that case, I can see no ground for any distinction, and am clearly of opinion, that the clerk of the dockets is not entitled to his poundage.

The rest of the Court were unanimously of the same opinion.

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Tuesday, July 10.

Chalk *v.* Deacon and Wife.

It seems that if a married woman be taken in execution for a debt contracted by her before marriage, she cannot be discharged, although the husband be in custody on mesne process in the same suit. At all events, the application for granting or refusing such discharge, is in the discretion of the Court.

Mr. Serjt. *Lawes*, on a former day in this Term, had obtained a rule *nisi*, that the defendant *Mary Deacon* might be discharged out of the custody of the sheriff of *Hertford*, as to a writ of *capias ad satisfaciendum* issued in this cause, she being a married woman, and her husband being already in custody at the same suit. He founded his motion on an affidavit of the latter, which stated, that in *November* last a writ of *capias ad respondendum* was issued out of this Court against him (who then was and still is a prisoner in the King's Bench), and *Mary* his wife, upon which she was arrested and held to bail, for 284*l.* 16*s.* 9*d.*, but afterwards discharged, on her entering a common appearance, by an order of Mr. Justice *Burrough*; that in last *Hilary* Term, a declaration was delivered to the husband, in this cause, whilst he was in custody, indorsed for bail for that sum, to which he and his wife suffered judgment to go by default, and notice of execution of a writ of inquiry of damages was duly served for the 25th *May* last, which was accordingly executed; that the husband is now detained in custody in this and four other actions, but that the plaintiff has not yet proceeded to charge him in execution in this cause; that in the 11th *June* last, a writ of *capias ad satisfaciendum* was issued against him and his wife in this cause, returnable on the morrow of the *Holy Trinity*, under which she was taken in execution, and now remains in the gaol for the county of *Hertford* thereon; that she is his lawful wife, and that she has no property or means of satisfying the levy; and that the plaintiff's motives in proceeding to execution against her are vexatious and oppressive.

The learned Serjeant submitted, that it was now the practice to discharge a *feme covert* when taken in execution,

as well as on mesne process (*a*); and even if it were not so, still that, under the circumstances, she would be entitled to it, on the ground of the plaintiff's having proceeded against her vexatiously and oppressively. He cited the cases of *Edwards* v. *Rourke* (*b*), Lady *Chaworth's* case (*c*), an *Anonymous* case (*d*); and *Crookes* v. *Fry* (*e*), as being favorable to the application; and observed, that as the husband had been in custody on mesne process from the time of suing out the writ, it was the duty of the plaintiff to have charged him in execution in this action.

Mr. Serjt. *Onslow* now shewed cause, on an affidavit which stated, that Mrs. *Deacon*, before her marriage with her present husband, was a widow, and had been left in possession of a considerable fortune by her former one, in whose mansion she resided; that the plaintiff was her house-keeper, and that the sum for which the arrest was made, was due to her for wages and past services. He submitted, that the rule laid down in *Tidd's Practice*, that a married woman, when taken in execution, may be discharged, as well as on mesne process, is not supported by any authority; and it is there admitted, that formerly, when the wife was taken in execution, she was not entitled to be discharged, unless it appeared that there was fraud and collusion between the plaintiff and her husband, to keep her in prison. In *Pitts* v. *Meller* (*f*), which was an action of trover against husband and wife, and judgment and execution against both;—the Court refused to discharge her out of custody, unless fraud were shewn. So, in *Finch* v. *Duddin* (*g*), a similar application was refused, in an action for a battery by the plaintiff's wife against the defendant's wife, where there was judgment for the plaintiffs, and the wife of the defendant was alone taken in execution; it not appearing that there was any de-

(*a*) See 1 Tidd, 7th edit. 220.——(*b*) 1 Term Rep. 486.——(*c*) 1 Lev. 51.——(*d*) Cro. Car. 513.——(*e*) 1 Barn. & Ald. 165. (*f*) 2 Str. 1167.——(*g*) Id. 1237.

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sign by the plaintiff to screen the husband. In an *Anonymous* case (*a*), the Court said, "The rule and practice is, that where there is judgment and execution against both the husband and wife, she shall not be discharged; but if they be both in custody upon mesne process, the wife shall be discharged upon common bail." In *Wilmot* v. *Butler* (*b*), the Court held, that a wife might be taken in execution upon a judgment against her and her husband. So, in *Cooper* v. *Hunchin* (*c*), where a *feme* married after interlocutory judgment against her upon a contract, yet it was held, that the plaintiff might proceed to judgment and execution against her, without joining the husband by *scire facias*; and Mr. Justice *Le Blanc* there said (*d*), "if the husband had been joined, the plaintiff might still have taken the wife in execution; there seems, therefore, no reason why the plaintiff might not take her at once, without joining the husband, if he did not mean to affect him." On these grounds, therefore, as well as that the wife was the original debtor to the plaintiff, and now appears to be possessed of considerable property, the Court ought not to allow her to be discharged.

Mr. Serjt. *Pell* and Mr. Serjt. *Lawes*, in support of the rule.—The practice as stated by Mr. *Tidd*, is at all events reasonable. The authorities cited for the plaintiff do not apply; for here, the husband is in custody on mesne process, and may be charged in execution in this suit. On principle, the wife is entitled to her discharge; for during the life of her husband, she has no control whatever over her property. The ground on which a *feme covert* may be discharged out of custody on mesne process is, that she cannot be compelled to find special bail, as she is possessed of no property of her own; and the same principle ought equally to apply to a case where she is taken in

(*a*) 3 Wils. 125.——(*b*) Sayer's Rep. 149.——(*c*) 4 East, 521, (*d*) Id. 523.

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execution, as she might remain in prison for life, unless the husband thought proper to satisfy the debt, and he might never be charged in execution at all. The case of *Cooper* v. *Hunchin* is mainly distinguishable from the present, as there the action was commenced against the wife when sole, and she did not marry until after interlocutory judgment had been obtained against her; and as she married during the suit, the Court would not deprive the plaintiff of the fruits of his action by her intermarriage. At all events, this is an application to the discretion of the Court; and in *Edwards* v. *Rourke* a *feme covert* was discharged out of custody, because she was arrested without her husband, although the writ was sued out against both, on which *non est inventus* was returned as to the husband; and Mr. Justice *Ashhurst* there said, "There are many authorities in favor of this application, and none against it; and the cases go with the reason of the thing, for a *feme covert* has no property of her own; and if it were permitted to arrest her, she might be imprisoned for life." In *Finch* v. *Duddin* the wife was not discharged, as the husband could not be taken; here, however, he is in custody on mesne process, and may be charged in execution at the option of the plaintiff. In *Doctor Hussey*'s case (*a*), which was for the ravishment of a ward, and the wife was found guilty and the husband acquitted, the principal point was, whether a *feme covert* was within the statute of *Westminster* 2nd, *c.* 35, or not; and it was held, that judgment ought to be given as well against the *feme covert*, as against those who were found guilty, because at the common law she was punishable for the ravishment of a ward, and should be fined and imprisoned for it, and that damages should be recovered against her, and levied upon her husband, and after his death, upon the wife herself. So, in *Bacon's Abridgment* (*b*), it is stated, that "if a person recovers in trespass against baron and feme, execution may be sued out against the feme after the death of her husband. So, if a recovery be in an

(*a*) 9 Rep. 71.——(*b*) Tit. Execution (Q) 4.

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assise against them upon a disseisin, execution shall lie against the feme after the death of her husband, as well for the damages as for the principal. So also, if in a *quare impedit*, damages be recovered against baron and feme to the amount of two years, and the husband dies, the damages may be recovered against the wife." These cases shew that judgment may survive against the wife after the death of the husband, and therefore that execution must be suspended against her during her coverture, and that she is not liable to be detained in custody although taken in execution, unless she has the means of satisfying the debt without the assistance of her husband.

Lord Chief Justice DALLAS.—It is necessary to consider what was the former, and what the present practice is in cases of this description; and if any variation has been made, on what distinction or authority it is founded, and into what it eventually resolves itself; and whether a married woman, when taken in execution, is entitled to her discharge by any positive rule; or whether it is in the discretion of the Court to grant or refuse such an application. Of the former practice there can be no doubt, for it has been established by a number of decisions; and in the book of practice to which reference has been made, the learned author has pointed out a distinction; and here, there is no pretence to say, that there has been any fraud or collusion between the plaintiff and the husband to keep the wife in prison. By the old practice, therefore, she was not entitled to be discharged. The next consideration is, whether that practice, established so firmly as it has been, is altered by any subsequent practice. Although the book relied on in support of this motion is entitled to the highest respect, still, the rule there laid down cannot be considered as an authority, as no case is cited in its support. It has been said, that on principle no distinction can be drawn between mesne and final process, as the wife has no separate property of her own. If we

look at the reason of the thing, there seems to be no valid distinction, because if a wife contracts debts before her marriage, the husband is liable; but it has been agreed at the bar, that even if the present practice differs from the former, still, that the rule is not inflexible, but that it is an application to the discretion of the Court. Whether they ought to interpose, by affording the relief required, must depend on the circumstances of each particular case. Here, it appears that the wife was living at the mansion house of her former husband when she was arrested; that she was indebted to the plaintiff for several years' wages for her past services as her house-keeper. This claim, in point of justice, ought not to be resisted, and I am therefore of opinion that the Court, in the proper exercise of their discretion, ought not to allow her to be discharged.

Mr. Justice PARK.—I am of the same opinion. It has been admitted, that applications of this description are in the discretion of the Court, who are to exercise it justly, according to the peculiar circumstances of the case before them. There appears to be no positive rule by which we are to be guided in this instance. In *Cooper* v. *Hunchin* it was held, that the execution must follow the nature of the judgment, which being against the feme only, the execution can only be against her; and Mr. Justice *Le Blanc* there said, "If the husband had been joined, the plaintiff might still have taken the wife in execution." Although the learned Editor of the work, in which the distinction is taken between the present and former practice, is entitled to the greatest respect, still, it is remarkable, that with all his well-known diligence and assiduity, he has produced no authority in its support. It has been said, that on principle a *feme covert* ought not to be taken in execution. It is true, that in some instances she ought not; but suppose a woman of fortune, having her property settled in trust for her during her life, marries a man with none, he might be liable to be imprisoned for life, for a debt contracted by her before marriage.

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Here, the plaintiff's cause of action is meritorious, and in which she seeks to recover the fruits of several years' services before the marriage of Mrs. *Deacon* with her present husband. I therefore think there is no colour for the present application.

Mr. Justice BURROUGH.—In *Wilkins* v. *Wetherill* (*a*), it was decided, that if a *feme covert* be taken in execution under a warrant of attorney given by her as a *feme sole*, she cannot be discharged on a summary application of this description. So, it appears that where a woman, who had given such an instrument, married during the Term, and was afterwards taken in execution, on a judgment signed as of that Term, and therefore having relation to the first day of the Term, it was holden, that she could not be relieved (*b*). The discharging a married woman on mesne process, stands on a wholly different ground, as she and her husband must be brought into Court before the plaintiff can proceed with his action. Here, it was commenced for meritorious services, and I am therefore of opinion, that there is no foundation for this application.

Mr. Justice RICHARDSON.—No decision has been found, nor a single instance alluded to, to support the distinction laid down by Mr. *Tidd*. Independently of that, however, there are in this case no circumstances to induce the Court to grant the relief required. In *Wilmot* v. *Butler* (*c*), the rule appears to be more distinct, and is decisive against the discharge; for it is said that execution must always follow the judgment. It seems, therefore, that the plaintiff is not to be deprived of any right he may have to recover against the wife. Here, it is true, the husband is in custody, but it does not appear on his affidavit that the time for charging him in execution has yet expired. On these grounds, I think the Court ought not to interpose.

Rule discharged.

(*a*) 3 Bos. & Pul. 220.——(*b*) See *Triggs* v. *Triggs*, Man. Exch. 67, 8. S. C. 1 Tidd, 220.——(*c*) Sayer, 149.

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IN THE EXCHEQUER CHAMBER.

De Tastet *v.* Rucker and Others.

Tuesday, July 10.

(In error.)

Upon error assigned of a misnomer of the christian name of one of the plaintiffs below in the warrants of attorney, the Court of Exchequer Chamber held it to be immaterial;—and they also allowed the transcript of the record to be amended before amendment in the Court below, where there had been no verdict and judgment entered in the *nisi prius* record and judgment-roll upon a plea of set-off.

The warrants of attorney on the record below in this cause were as follows:—"*London*, to wit, *Martin Albert Rucker*, *John Ernest Frederick Westphalen*, and *John Christopher Rist* put in their place *George Tomlinson* against *Fermin de Tastet* in a plea of trespass on the case."—"*London*, to wit, the said *Fermin de Tastet* puts in his place *James Lowe* his attorney, at the suit of the said *Martin Albert Rucker*, *John Ernest Frederick Westphalen*, and *John Christopher Rist*, in the plea aforesaid." The declaration was in *assumpsit*, and contained several counts for use and occupation, the carriage of goods, work labour and commission, and the usual money counts; in all of which, *Rist* was described by the names of *John Christopher Frederick Rist*, and not *John Christopher Rist*, as in the warrants of attorney. The defendant below pleaded the general issue, and a plea of set-off, on both of which issue was joined; and the *postea* was in the following terms:—"And the jurors of the jury whereof mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried, and sworn, say upon their oath, that the said *Fermin de Tastet* did undertake and promise in manner and form as the said *Martin Albert Rucker*, *John Ernest Frederick Westphalen*, and *John Christopher Frederick Rist*, have within complained against him, and they assess the damages of the said *Martin Albert Rucker*, *John Ernest Frederick Westphalen*, and *John Christopher Frederick Rist*, on occasion of the premises, besides their costs and charges by them about their suit in this behalf expended, to 9048*l.* 0*s.* 9*d.*

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and for those costs and charges to forty shillings;" and judgment was signed accordingly.

The defendant below brought a writ of error in this Court, and assigned for causes, that the declaration was insufficient in law for the plaintiffs below to maintain their action against him; that by the record it appears that in the warrant of attorney filed and remaining of record of the Court below, to warrant *George Tomlinson* to be attorney for the plaintiffs below against the defendant below in the plea aforesaid, the said *John Christopher Frederick Rist* is described by the names of *John Christopher Rist*, and not by the names of *John Christopher Frederick Rist*; that by the record it appears, there is no warrant of attorney filed or remaining of record in the Court below between the parties aforesaid, to warrant *Tomlinson* to be attorney for the plaintiffs below against the defendant below; that by the record it appears, that the warrant of attorney filed and remaining of record in the Court below between the parties aforesaid, to warrant *James Lowe* to be attorney for the defendant below at the suit of the plaintiffs below in the plea aforesaid, the said *John Christopher Frederick Rist*, is described by the names of *John Christopher Rist*, and not by the names of *John Christopher Frederick Rist*; that by the record it appears that there is no warrant of attorney filed or remaining of record in the Court below between the parties aforesaid, to warrant the said *James Lowe* to be attorney for the defendant below at the suit of the plaintiffs below; that by the record it appears, that there were two issues joined between the plaintiffs below and the defendant below, but that the Jury who were summoned to try those issues, found a verdict for the plaintiffs below on one of those issues only, but did not find a verdict either for the plaintiffs below or for the defendant below on the other of such issues. Joinder in error.

Mr. *Littledale*, on a former day in this Term, being about to argue on the part of the plaintiff in error, that the war-

rants of attorney did not authorise the judgment, inasmuch as all the parties were not correctly named therein, and that the verdict and judgment were bad, as being upon one and not both the issues joined between the parties.

Mr. *Frederick Pollock*, for the defendants in error, applied for leave to amend the transcript of the record as to the omission in the *postea* of any entry of verdict and judgment upon the issue joined on the plea of set-off; which the Court granted on payment of the costs of the day, and he was afterwards allowed to amend the Nisi Prius record, and judgment-roll in the Court below.

Mr. *Littledale* now moved, that the rule for amending the transcript might be discharged, as it was made prospectively; that the *postea* and judgment-roll should have been amended in the Court below, and brought here by a writ of *certiorari* in its amended state, before this Court should have allowed the transcript to be amended;—or that at all events, the plaintiff in error might be at liberty to reconsider and amend his assignment of errors.

The Court, however, observed, that as the *postea* and judgment-roll had been duly amended in the Court below, there was no weight whatever in the objection.

He then submitted, that the misnomer of the christian name of *Rist* in the warrants of attorney, was a fatal objection, as it was a complete variance from the rest of the record, and might either have been taken advantage of in the Court below, or assigned here as a substantive ground of error. In *Comyn's Digest* (*a*), although it is laid down, that by the statute 8 *Hen.* 6. *c.* 12, Judges may examine and amend in affirmance of judgment, a misprision of the clerk

(*a*) Tit. Amendment, (E) 1.

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in a warrant of attorney; and that by the statute 18 *Eliz.* *c.* 14, after verdict, no judgment should be stayed or reversed for want of such an instrument; yet, by the common law, a misprision in a warrant of attorney would be error. In *Viner's Abridgment* (*a*), it is said, "that if *A.* executor of *C.* brings debt against *B.*, and the record is, that *B.* puts in his place *I.* against *A.* in a plea of debt, and does not name *A.* executor in the warrant; this is no good warrant. So, if a man appears by —— *Higgins* his attorney, without putting his christian name, this is not good, but as if he had no attorney named. So, where in a common recovery suffered in a writ of entry brought against *Elizabeth P.*, the warrant of attorney for the defendant was *Alicia P.* puts in her place *A. B.*, &c. against *N.*; the putting *Alicia* for *Elizabeth* is not good, for there is no warrant of attorney entered for *Elizabeth*. So, in account by *H. De Bert'*, he counted by attorney, and his warrant was for *H. Bert'*, without *De*; the defendant went without day. So, a warrant of attorney by a mayor and commonalty, must be general according to his writ, and because it was that the mayor and citizens *posuit loco suo*, he shall not plead misnomer; and therefore he shall have in such case special warrant of attorney by their very names of incorporation, and then the attorney shall plead misnomer." Although these decisions were antecedent to the statute of *Elizabeth*, still, they were such misprisions as were error at common law, and for which the judgments were reversed; and consequently they are not cured by that statute. If that be so, a misnomer of this description cannot be cured after verdict, but must remain as it stood at common law before the statutes of jeofails were passed. In *Tidd's Practice* (*b*), it is laid down as a rule that the declaration must regularly correspond with the process, in the christian and surnames of the parties; and in the cases of *Corbett* v. *Bates* (*c*), and *Dring* v. *Dickinson* (*d*), it was decided, that

(*a*) Tit. Attorney, H. vol. iii. 292. See also 1 Roll. Abr. tit. Attorney, H. 289.——(*b*) 7th edit. 456.——(*c*) 3 Term Rep. 660.——(*d*) 10 East, 225.

if a defendant be served with a writ by a wrong christian name, the Court will order the proceedings to be set aside; and although those cases do not apply strictly to warrants of attorney, yet, the principles on which they were decided, do so. The cases of *Shadgett* v. *Clipson* (*a*), and *Arbouin* v. *Willoughby* (*b*), shew, that if a defendant has two christian names, and is sued by only one of them, it is a good ground to set aside the proceedings. In *Delanoy* v. *Cannon* (*c*), it was held, that a declaration against a defendant by a different name to that in the writ, was irregular; and in *Bingham* v. *Dickie* (*d*), it was determined, that a variation in the spelling of the plaintiff's surname in a single letter only, was fatal, and could not be amended. So, in *Viner's Abridgment* (*e*), it is said, that "where the original was *Senjohn* without a *t*, and the exigent was *Sayntjohn* with a *y* and *t*, the outlawry was reversed; for that there was as much difference as between *Hereford* and *Hertford*. So, if a man declare against *J. S.* and *Agnes* his wife, and the record of nisi prius is *Anne* his wife; this is a material variance, and not amendable." If, therefore, there be any irregularity in the process, which might have been taken advantage of by a plea in abatement, or otherwise, in the Court below, it may be assigned for error here. The defect is not cured by the statutes of jeofails, and as warrants of attorney may be filed at any time before final judgment, the defendant below had no opportunity to plead in abatement, nor could he apply to the Court on the ground of a variance in the record, still, however, it is a good cause of error that no warrants of attorney are filed as between the original parties in the cause; and the omission of part of the christian name of one of the plaintiffs below, renders such warrants altogether a nullity, and of which the plaintiff in error is now entitled to take advantage.

Mr. *Frederick Pollock, contrà*, contended, that the errors assigned amounted only to this, *viz.* that there were no war-

(*a*) 8 East, 328.——(*b*) 1 Marsh. 477.——(*c*) 10 East, 328.——(*d*) 5 Taunt. 814.——(*e*) Tit. Misnomer (A.)

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rants of attorney remaining of record in the Court below as between those parties. In point of fact there are none. The omission of part of the christian name of one of the plaintiffs below is cured by the statutes of jeofails, or, at all events, the want of a warrant of attorney is cured after verdict. He was proceeding with his argument, when he was stopped by the Court.

Lord Chief Justice DALLAS.—If the Court entertained the least doubt as to the objection which has been raised with respect to the misnomer in the warrants of attorney, they would take time to consider and look into the authorities which have been cited in support of such objection, but it is necessary to guard against delay, as the sum in question is not only of magnitude but of considerable importance to the parties.—The nisi prius record and judgment-roll, as well as the transcript of the record, have been duly amended, and the Court are unanimously of opinion that there is no ground whatever as to the first objection, as to the amendment of the transcript being premature :—and it appears to be equally clear that there is as little weight in the second as to the misnomer, and consequently, the judgment of the Court below, as it now stands, must be

Affirmed.

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IN THE EXCHEQUER CHAMBER.

BRETHERTON and Others *v.* WOOD.

Tuesday, July 10.

(In error.)

In an action on the case in the King's Bench against ten defendants, the plaintiff declared, that before and at the time of the grievances complained of, they were proprietors of a stage coach for the conveyance of passengers for hire from *A.* to *B.*, and that being so, they received the plaintiff as an outside passenger, to be safely conveyed thereon from *A.* to *B.*, for hire to them in that behalf; and that by reason thereof they ought to have safely conveyed him accordingly; and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskilfulness, and default of themselves and their servants, the coach was overset; by means whereof the plaintiff was hurt, and sustained other injuries. A jury having found a verdict against eight of the defendants only, and in favor of the other two, and judgment being entered accordingly,—Held, that as the action was founded upon a breach of duty imposed by the custom of the realm, which was a breach of the law, and as the declaration was framed on a misfeasance, such verdict and judgment were not erroneous, and they were therefore affirmed in the Exchequer Chamber, in error.

THIS was an action on the case, brought against ten defendants below (plaintiffs in error), as proprietors of a stage coach, for an injury sustained by the plaintiff below (defendant in error), a passenger, in consequence of the coach being overturned. The first count of the declaration stated, that before and at the time of committing the grievances thereinafter next mentioned, the said defendants (plaintiffs in error) were proprietors of a certain stage coach, for the carriage and conveyance of passengers for hire, from *Bury*, in the county of *Lancaster*, to *Bolton*, in the same county, to wit, at, &c.; and being such proprietors of the said stage coach, the said defendants (plaintiffs in error), to wit, on, &c., at, &c., received the said plaintiff (defendant in error), and the said plaintiff (defendant in error) became and was an outside passenger upon their said stage coach, to be safely and securely carried and conveyed thereon, from *Bury* aforesaid to *Bolton* aforesaid, for certain hire and reward to the said defendants (plaintiffs in error), in that behalf; and, by reason thereof, the said defendants (plaintiffs in error) ought safely and securely to have conveyed, or

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caused to be conveyed, the said plaintiff (defendant in error), on the said coach, from *Bury* aforesaid to *Bolton* aforesaid; yet the said defendants (plaintiffs in error), not regarding their duty in this behalf, conducted and behaved themselves so carelessly, negligently, and unskilfully in this behalf, that by and through the mere carelessness, negligence, unskilfulness, and default of themselves and their servants in that behalf, the said coach afterwards, and whilst the same was carrying and conveying the said plaintiff (defendant in error), as aforesaid, and before the arrival thereof at *Bolton* aforesaid, to wit, on, &c., was overset and overturned, to wit, at, &c.; by means whereof, the said plaintiff (defendant in error), then being thereupon, became and was greatly cut, bruised, wounded and hurt, and sustained other injuries. The second count stated, that whereas also, heretofore, to wit, on, &c., at, &c., the said defendants (plaintiffs in error), being then and there proprietors of a certain other stage coach, they received the said plaintiff (defendant in error), and he, at the special instance and request of the said defendants (plaintiffs in error), became and was an outside passenger by the said last-mentioned stage coach, to be safely and securely carried and conveyed thereby from *Bury* aforesaid to *Bolton* aforesaid, to wit, at, &c.; by reason whereof, the said defendants (plaintiffs in error) ought safely and securely to have conveyed, or cause to be conveyed, the said plaintiff (defendant in error), on their said last-mentioned coach, from *Bury* aforesaid to *Bolton* aforesaid; yet the said defendants (plaintiffs in error) again, not regarding their duty in this behalf, conducted and behaved themselves so carelessly, negligently, and unskilfully in this behalf, that by and through the mere carelessness, negligence, unskilfulness, and default of themselves and their servants in that behalf, the said last-mentioned coach, afterwards, and whilst the same was carrying and conveying the said plaintiff (defendant in error), as such outside passenger as aforesaid, to wit, on, &c., was overset and overturned, to wit, at, &c.;

by means whereof the said plaintiff (defendant in error), then being thereupon, became and was greatly cut, bruised, wounded, and hurt. To this declaration the defendants below (plaintiffs in error) pleaded Not Guilty, on which issue was joined.

At the trial of the cause at *Lancaster*, at the Summer Assizes, 1820, the Jury found that two of the defendants below were not guilty of the premises laid to their charge, and that the other eight were guilty thereof; and they assessed the damages of the plaintiff below, as against those eight, at 50*l.* besides costs. On this verdict, judgment was entered up in the Court of King's Bench in the last *Michaelmas* Term for the plaintiff below, that he recover damages and costs against the eight defendants below, who were so found guilty; and the two for whom a verdict of not guilty was given, should go without day.

Those who were so found guilty having brought a writ of error in this Court, assigned for errors, that although by the record it appears that the plaintiff below commenced and prosecuted his action in this behalf, and declared therein against all of them the eight defendants below (naming them), jointly with the two others, nevertheless it appears in and by the record, that the verdict was given severally, that is to say, that the said two defendants below were not guilty of the premises laid to their charge, and that the said eight defendants below were guilty of the premises laid to their charge, as the plaintiff below hath within thereof complained against them; and that it appears in and by the said record, that judgment thereon was given for the plaintiff below against the said eight defendants only, and not against the two others, but that judgment thereon was given for those two against the plaintiff below; whereas, by the law of the land, the judgment should have been given either to the plaintiff below against all of them the said ten defendants below, or for all of them the said ten defendants below against the plaintiff below. Joinder in error.

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The case came on for argument on a former day in this Term, when

Mr. *Littledale*, for the plaintiffs in error, submitted that the judgment was erroneous, as the gist of the action was founded on contract; that the effect of the statement in the declaration amounted substantially to such, and that it must be therefore governed by the ordinary rules of pleading, *viz.* that if a contract be laid as a joint contract against several, there can be no recovery against one only, as upon a several contract. It is said, however, that as the declaration is laid in *tort*, a different rule prevails, and that as the gist of the action is misfeasance, there is no repugnancy in finding some of the defendants guilty and acquitting the others. It is manifest, however, that this is in effect a contract, as it is stated that the defendants below were the proprietors of a coach for the conveyance of passengers *for hire*, and as such received the plaintiff below as an outside passenger, to be safely carried by them for certain hire and reward; by reason whereof he ought to have been safely carried and conveyed. It is, therefore, in point of fact, the same as if the declaration had stated, that before the promise of the defendants below thereinafter mentioned, they were the proprietors of a certain stage coach, and in consideration that the plaintiff below had engaged to become a passenger thereon, they undertook that he should be carried safely and securely. The mere statement that he was a passenger by their coach, raises an implied duty in them to take care that he should be conveyed safely. Even in *assumpsit*, it is not necessary to introduce the words "in consideration" in the declaration, if sufficient be therein stated to shew that the promise is founded on a consideration, as in an action for money had and received, where it is unnecessary to shew for what cause it was received. In *Coggs* v. *Bernard* (*a*), the declaration was in effect founded on a contract, and although it alleged that the defendant undertook to convey goods safely and securely, without stating a promise to do

(*a*) 2 Ld. Raym. 909.

so, in consideration of their having been delivered to him for that purpose, still Mr. Justice *Gould* there observed, that the declaration would be good either way, that is, whether it were laid on the contract or in *tort*; and although not guilty was there pleaded, yet *non assumpsit* would have been an equally good answer to the action, and it was at the election of the defendant to have adopted either of those pleas, as an undertaking or promise was stated in the declaration. Here, although the breach charges the defendants below with negligence in the conveyance of the plaintiff below, and an injury sustained by him in consequence of the overturning of their coach, it may be considered as surplusage; and if the declaration had been founded on the contract, it would only have been necessary to have assigned a breach of it in general terms. So, in a suit by executors against executors in *assumpsit*, it is only necessary to state in the breach that the defendants had not paid generally, omitting the special part relating to non-payment. This case, therefore, must be governed by the same rules as an action of *assumpsit*; and the declaration must be taken as being framed on a contract, although the words "consideration," or "promise," be not contained therein. If it be treated as *tort*, it will be productive of the most serious inconveniencies to the defendants; for, in the first place, they will be precluded from pleading in abatement, and so bringing before the Court all those who may be jointly liable with themselves. If, therefore, a verdict be found against one only, and he seeks to recover contribution against the others, he must prove that they were co-partners, and shew their liability, as the record in this action would not be evidence for him; whereas, it would be otherwise in *assumpsit*. But further, in *Merryweather* v. *Nixan* (*a*), it was determined that no action for contribution could be sustained as between two defendants found guilty of a *tort*, where the damages had been paid by one; and Lord *Kenyon*

(*a*) 8 Term Rep. 186.

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there laid down the distinction between a case of *tort* and that of a joint judgment against several defendants in an action of *assumpsit*; and although that action was brought for an injury relating to land, still, it appears that the same rule would hold in every case of misfeasance arising out of a *tort*. Secondly, if this action were brought against three proprietors, and one of them should not be a joint proprietor, the other two would lose the benefit of his testimony, although he might be a most important witness for them; but in *assumpsit* such third person could not have been joined. A plaintiff, therefore, would be more safe in proceeding in *tort* against several defendants, as it does not require the caution necessary in an action founded on a contract, in which he would be nonsuited in case he sued those who ought not to be made co-defendants. Thirdly, there is another cogent and obvious reason why the defendants below should have been sued in contract; for if the parties had been reversed, and they had sued the plaintiff below for his fare, they must have all joined, or they would have been nonsuited at the trial; and the same rule ought to apply in an action brought against them. These grounds are at all events, sufficient to shew the principle, as well as the hardship the defendants below would labour under, in case the judgment, as found against them, should be allowed to stand.—With respect to authorities, they are clearly in their favour. In *Buddle* v. *Willson* (*a*), the action was founded in case on the custom of the realm, but the immediate judgment of the Court went no further than to exclude the plea in abatement, which being pleaded after a general imparlance, was holden to be too late; but there the Court considered the gist of the action as being founded in contract, as they intimated an opinion, that if the plea had been put in in proper time it might have been supported. So, in *Powell* v. *Layton* (*b*), it was determined, that a declaration against a carrier by water, stating "that he had received goods to carry for freight, but that he had not conveyed

(*a*) 6 Term Rep. 369.——(*b*) 2 New Rep. 365.

and delivered them according to his duty," was founded in contract; and that to a declaration so framed, the defendant might plead in abatement that he was only liable jointly with his partners, and that they were not sued. That is a direct authority in favour of the plaintiffs in error. In *Weall* v. *King* (*a*), it was held, that a declaration in case, alleging a deceit by means of a warranty made by two defendants upon a joint sale, was not supported by proof of a contract of sale and warranty by one only; the action, though laid in *tort*, being founded on the joint contract alleged. That case is stronger than the present, as the ground of action originated in fraud; whilst here, it is founded purely on contract. In *Green* v. *Greenbank* (*b*), where the plaintiff declared, that having agreed to exchange horses with the defendant, the latter, by falsely warranting his to be sound, well knowing it to be unsound, falsely and fraudulently deceived the plaintiff; it was held, that infancy was a good plea in bar; on the ground, that where the substantial cause of action is contract, a plaintiff cannot, by declaring in *tort*, render a person liable who would not have been so on his promise. In the earlier case of *Boson* v. *Sandford* (*c*), it was decided, that an action charging defendants with a breach of their duty as carriers, was not an action *ex delicto*, but *ex quasi contractu*, and it was so considered by Lord *Kenyon*, in *Mitchell* v. *Tarbutt*, where he observed (*d*), that *Boson* v. *Sandford* was treated by the whole Court as an action for a breach of contract. So, in *Dale* v. *Hall* (*e*), which was *assumpsit* against the defendant, a keelman, as a common carrier, for damage done to goods delivered to his custody to be safely carried from port to port, Mr. Justice *Denison* considered the action against a carrier as founded in contract, and that the circumstance of the *suscepit* being omitted or introduced in the declaration, made no difference.

(*a*) 12 East, 452.——(*b*) 2 Marsh. 485.——(*c*) 2 Salk. 440. S. C. Skin. 278. Carth. 58. 1 Show. 101. 2 Show. 478. 3 Lev. 258. 3 Mod. 321.——(*d*) 5 Term Rep. 651.——(*e*) 1 Wils. 281.

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The only case which impugns or tends to contradict those authorities, is that of *Govett* v. *Radnidge* (*a*), where it was held, that in an action on the case in *tort* against several defendants, for negligence in performing a contract, some of them may be acquitted and the others found guilty; and that if some contractors only are sued, they cannot plead in abatement the non-joinder of the others, on the ground that the gist of the action was the *tort*, and not the contract out of which it arose. That case, however, was decided before *Weall* v. *King*, which is in direct opposition to it. It is true, that in *Govett* v. *Radnidge*, the case of *Dickon* v. *Clifton* (*b*) was much relied on, where the declaration contained a count similar in terms to that in the former, and which was joined with one in trover; and Lord Chief Justice *Wilmot* there observed, that they might be well joined. That case, however, is not entitled to any great weight, as no reason is laid down by the Court for that doctrine, but it is merely stated, that common experience and practice warranted it; and the Lord Chief Justice was made to express a doubt whether trespass *vi et armis* and trover could be joined. [Mr. Justice *Richardson*.—If the declaration be framed in *tort*, for a breach of duty in not carrying goods safely or securely, it is the general, if not the universal practice to add a count in trover (*c*).] Here, the undertaking was in the nature of a *joint* contract to carry for hire, and it therefore falls within the principle laid down in *Weall* v. *King*. The case of *Mitchell* v. *Tarbutt* (*d*), is distinguishable from all the others that have been cited, and inapplicable to the present, as the action was brought for running down a ship, which was an injury *ex delicto*, and wholly independent of any contract. So, in *Max* v. *Roberts* (*e*), the judgment eventually turned on a collateral

(*a*) 3 East, 62.——(*b*) 2 Wils. 319.——(*c*) This position is fortified by a *dictum* of Mr. Justice *Buller*, in *Brown* v. *Dixon*, 1 Term Rep. 277, where he observed, that "the common way of declaring against a carrier now is in *assumpsit*, to which trover cannot be joined; but if the plaintiff declare on the custom of the realm, a count in trover may be joined; it only depends on the *form* of the action."——(*d*) 5 Term Rep. 649.——(*e*) 2 New Rep. 454. S. C. (*in error*), 12 East, 89.

point, and irrelevant to the present question, *viz.* a defect in the declaration. As well therefore, on reason, principle and authority, as from the inconveniences which must result to the plaintiffs in error, this judgment cannot be supported, by converting an action founded on contract into *tort*; for the substance of the declaration is, that the plaintiffs in error received the defendant in error as a passenger on their coach, to be carried for hire; and, as Lord Chief Justice *Mansfield* observed in *Powell* v. *Layton* (*a*), "On reading this declaration, does it not clearly appear that it is founded on contract? Although the word *suscepit* is not used therein, yet, the nature of the charge is, that the defendant agreed to carry the goods to *Sicily*, and has failed in the performance of his agreement. The duty of a carrier I do not understand otherwise, than as that duty arises out of his contract." So, Lord Chief Justice *Gibbs*, in *Green* v. *Greenbank* (*b*), said "Where the substantial ground of action rests on promises, the plaintiff cannot, by changing the form of action, render a person liable who would not have been liable on his promise." On these grounds, therefore, the judgment of the Court below must be reversed.

Mr. *Manning*, *contrà*.—The principal objection which has been raised to this form of action is, that if the parties had been reversed, and the plaintiffs in error had sued the defendant in error in *assumpsit* for his fare, which was their only remedy, they must all have joined, or been nonsuited at the trial; but one proprietor of a stage coach must know all his co-proprietors, and there would be little or no difficulty for them to set out their true names and descriptions in the declaration, and state that the promises were made to them jointly; while, on the other hand, a passenger, if obliged to sue in contract, might not be able to obtain those names, but through a plea in abatement. So, with respect to contribution, no such difficulty or inconvenience exists, for such co-proprietors are partners as carriers for the convey-

(*a*) 2 New Rep. 369.——(*b*) 2 Marsh. 486.

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ance of passengers and goods; there are, in fact, two distinct contracts, one between themselves as partners, and another as between them and their passengers; and if a loss be sustained by them as such proprietors, and one pays the whole on the partnership account, he may recover against the others their shares of such loss, not on the ground of contract, but on their relation as partners. In *Merryweather* v. *Nixan* both parties were wrong-doers, and equally culpable; but that does not apply to a case of joint proprietors, to whom another remedy is given by an action of *assumpsit* or account. As to the inconvenience which may result from suing or joining a party, for the purpose of excluding his testimony as a witness, the Court will not intend that such a fraudulent course would be adopted. At all events, the Jury would be enabled to judge whether such party had been improperly made a co-defendant or not. As to authorities quoted, the case of *Dickon* v. *Clifton* is expressly in point; and although it has been said that it is not entitled to much weight, as no substantial reason is assigned why the count in trover might be added, still, it is there stated, that in order to shew that such a count could not be joined with the two former, many old cases were cited from *Viner's Abridgment* (*a*), which the Court over-ruled, but which are not particularly referred to by the reporter; and though the Chief Justice is there made to doubt whether trespass and trover could be joined, still, he concluded by stating, that he thought they could not, because they would have different judgments. *Coggs* v. *Bernard* appears to be decisive of the present question; for it was there decided, that where a person undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he is not a common carrier, nor has any reward for his labour, and that it is at the election of the party entrusting him with the goods to sue him in *assumpsit* on an express or implied contract, or in *tort*. If either of these forms of action should

(*a*) Tit. Action, Joinder.

be excluded, it seems it should be *assumpsit*; for it is there stated, that the defendant *undertook* to convey, and if the declaration had been considered as framed in *assumpsit*, it would have been bad for want of consideration; for it did not state that the defendant was to receive any remuneration for his labour, although it was his duty to carry with care. Formerly, in all actions against carriers, it was the practice to declare in *tort*; and although the mode of declaring in *assumpsit* has succeeded, still, it does not supersede the former and usual remedy. A double duty attaches on a carrier, *viz.* partly by the custom of the realm, and partly by the terms of his contract, and the former imposes an obligation on him by the law; he is therefore open to both species of action. Although actions for nonfeasance may be considered in the nature of contract, yet, where misfeasance is the gist of the action, *tort* is the more proper remedy, notwithstanding *assumpsit* may be resorted to. In *Keilway* (*a*), a distinction was taken between an action on the case and detinue, as if *A.* delivers goods to *B.* to be kept safely, and he lends them to another, whether for reward or not, and through his default they are lost, *A.* may have an action on the case, for if he brings detinue, which he may, he would only recover the goods themselves; but if *B.* sells the goods to another, then *A.*'s remedy is by detinue, and not by action on the case; and *Fairfax* said, "if a person delivers a chest to a bailee, and he breaks it open, he is liable to a general action of trespass." The remedy by an action of trover was not then known. The case of *Poxell* v. *Layton* has been mainly relied on for the plaintiffs in error, but there the defendant was a ship-owner, and there were express words of contract; and the decision of the Court was principally founded on the authority of *Boson* v. *Sandford*, which Lord Chief Justice *Mansfield*, in delivering judgment, clearly considered as being founded in contract (*b*); and Mr. Justice *Chambre*, in the course of the argument, observed,

(*a*) Page 160, a.——(*b*) 2 New Rep. 371.

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that (*a*) "that case was treated by all the parties as an action on the case, and that it was impossible that Lord Chief Justice *Holt* could have called it *quasi ex contractu*, if in truth it was contract." Besides, the entry there was *super se suscepit*, and his Lordship must have been treating of the liability of other parties, when he considered it to be *quasi ex contractu*. In *Boson* v. *Sandford* (*b*), Lord Chief Justice *Holt* said, that "he could not distinguish that case from *Cole* v. *Wilkes*" (*c*), where, in an action of debt for not setting out tithes, it appeared that there was another joint occupier, and advantage was taken of it on the general issue, because the duty arose from the occupation. *Mast* v. *Goodson* (*d*), is in point to shew, that the declaration of the plaintiff below was properly framed; for there, the declaration contained a count for obstructing the plaintiff in loading goods at a wharf, contrary to an agreement, as well as a count in trover; it was objected, that they could not be joined, because the first was laid to be upon an express agreement in writing, and sounded wholly in contract, and the latter was in case for trover, which is a *tort*; but the Court held, that the gist of the action was in *tort*, and therefore that those counts were well joined. In *Green* v. *Greenbank* (*e*), the Court properly held, that the plaintiff could not declare in *tort*, because the subject-matter of the action was founded wholly on contract; and Lord Chief Justice *Gibbs* observed, that "it was a case in which the *assumpsit* was clearly the foundation of the action." In *Compton* v. *Richards* (*f*), which was an action on the case for obstructing the plaintiff's lights, the Court of Exchequer held, that the gist of the action was *tort*, although it arose out of a contract, and that it was sufficient that the plaintiff declared on his possession, and that he had sustained a wrong, although the conditions under which the premises were sold amounted to an agreement between the parties. The declaring in *tort*

(*a*) 2 New Rep. 367.——(*b*) 1 Show. 105.——(*c*) Hutton, 121.——(*d*) 3 Wils. 348. S. C. 2 Sir Wm. Blac. 848.——(*e*) 2 Marsh. 486.——(*f*) 1 Price, 27.

is the mere adaptation of the form of action, and if the objections to it now raised are held tenable, a common carrier can hereafter be sued only in *assumpsit*. A contract need not be implied, nor does any in fact exist; for if the proprietors of a coach refused to carry a passenger, he might insist on being conveyed by the custom of the realm, if there were a vacant place; in which case, if he received an injury in consequence of its being overturned, he could not sue in *assumpsit*, as there would be no contract whatever between the parties. *Brown* v. *Dixon* (*a*) is also an authority in point, where the first count was in trover for a dog, and the second and third stated, that the plaintiff had delivered it to the defendant at his request, to be returned by him in a reasonable time, but that he would not do so; and in the course of the argument a sound distinction was taken between nonfeasance and misfeasance, *viz.* that the former is neglecting to do that which a person has either expressly or impliedly undertaken to do; the latter is the act of doing something in a different manner from that in which the party is bound, either by law or by his own contract, to do, and is a *tort*; and Mr. Justice *Buller* there laid down the rule, that wherever the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration; and he not only recognized the case of *Dickon* v. *Clifton*, but observed, that it was not to be distinguished from that before him. *Mitchell* v. *Tarbutt* is inapplicable, as it rested entirely on *tort*, and the distinction was there drawn by Lord *Kenyon* between that case and *Boson* v. *Sandford*. Independently of all these authorities, the case of *Govett* v. *Radnidge* is expressly in point; and although Lord Chief Justice *Mansfield* seemed to impugn its authority in *Powell* v. *Layton*, still the doctrine there laid down has been since recognized and adopted in *Ansell* v. *Waterhouse* (*b*), where it was decided, that in an action on the case against a common carrier for not safely carrying a passenger, the defendant could

(*a*) 1 Term Rep. 274.——(*b*) 2 Chit. Rep. 1.

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not plead in abatement the non-joinder of a co-proprietor. [Mr. Justice *Richardson*.—I argued that case, and the declaration stated, that the defendant was the proprietor of a stage coach for the carriage of passengers for hire, and that he had received the plaintiff's wife as a passenger, to be carried for hire, and that not regarding his duty, the coach was overturned, and the wife hurt; and the Court there held, that as there was no word of contract in the declaration, there was nothing to shew that it was not founded on the custom of the realm, and that in substance the defendant was stated to be a common carrier, on whom a duty attached, which was collateral to any contract, and therefore, that the plaintiff had his election to sue either in *assumpsit* or *tort*.] *Weall* v. *King* was decided on a collateral point, *viz.* a variance between the declaration and fact proved in evidence. It was not true that both the defendants bargained with the plaintiff, and Lord *Ellenborough* observed (*a*), that "a joint contract was necessary to be laid, in order to maintain the ground of action as stated upon the record, and being so laid, and not proved, the plaintiff was properly nonsuited." *Buddle* v. *Willson* was decided as to the time of pleading in abatement: that was the preliminary point, and therefore what is there stated as bearing on this question, must be treated as a mere *obiter dictum*; and it need only be further observed, that in *Powell* v. *Layton* the case of *Dickon* v. *Clifton* was not at all adverted to, either in the argument, or judgment of the Court, although it was slightly noticed by the Chief Justice, after the judgment had been delivered.

Mr. *Littledale*, in reply.—The cases of *Mast* v. *Goodson*, *Compton* v. *Richards*, and *Brown* v. *Dixon* turned entirely on *tort*; the first was founded on a misfeasance; for the agreement or contract which had been for some years executed by the plaintiff and defendant, was only introductory to shew the *tort* done by the latter to the former; in the

(*a*) 12 East, 455.

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d it appeared that the defendant had built a wall, which ucted the plaintiff's lights, and by which he sustained an y, and the conditions of the purchase were not relied on ntract, but merely as shewing the meaning of the par- and the last was for not returning a dog, in which Court held, that a count in trover might be joined. It has said, that *Coggs* v. *Bernard* was founded in *tort*, and that declaration had been considered as framed in *assumpsit*, uld have been bad for want of consideration, but a inary consideration is not necessary to support that form ion; for the delivery of the casks by the plaintiff to defendant, to be carried and deposited in a cellar, is ient to impose on the latter the carrying them with , and raises an implied promise on his part to do so. declaration, therefore, might have been framed either rt or *assumpsit*, as a delivery by the plaintiff, and ac- nce by the defendant, would be sufficient to support latter form of action, and as he undertook to carry y, that is of itself the completion of a contract between parties. Wherever a cause of action amounts substan- y to a contract, it must be founded on a promise; but re a party has been guilty of misfeasance, as a sheriff or officers, it must be grounded on *tort*. This case must be rned by the principles laid down in those of *Weall* v. *King*, en v. *Greenbank*, and *Powell* v. *Layton*, in the latter of h Lord Chief Justice *Mansfield* said (*a*), that "the duty carrier arose only out of his contract, and though by the ch of such contract he was liable to an action, yet, that action must be founded in contract; for that in *Merry- ther* v. *Nixan* it was held, that no action for contribution d be sustained, as between two defendants found guilty *tort*, where the damages had been paid by one." So, , the substantial cause of action is founded on contract, by adding a few words to the declaration, it would be d in *assumpsit*; but a mere alteration of it in terms, can-

(*a*) 2 New Rep. 371.

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not vary the nature and cause of the action; and if it arises out of a contract, it cannot be converted into *tort*, by the mere omission of the statement of the consideration and promise.

Cur. adv. vult.

Lord Chief Justice DALLAS on this day delivered the judgment of the Court as follows :—

This case comes before us by a writ of error, brought to reverse the judgment of the Court of King's Bench; and is an action on the case against the plaintiffs in error. The declaration stated, that before and at the time of the grievances complained of, the plaintiffs in error were the proprietors of a certain stage coach, for the carriage and conveyance of passengers for hire, from *Bury*, in the county of *Lancaster*, to *Bolton*, in the same county; and being so, that they received the defendant in error, (who was the plaintiff below) and that he became an outside passenger, to be safely carried and conveyed thereon from *Bury*, aforesaid, to *Bolton* aforesaid, for hire and reward to the said plaintiffs in error in that behalf; and that by reason thereof, they ought safely to have conveyed, or caused to be conveyed accordingly, the said defendant in error. It then alleged, that not regarding their duty in this behalf, they so conducted themselves, that by and through the carelessness, negligence, unskilfulness, and default of themselves and their servants, the said coach was overset; by means whereof, the defendant in error was greatly bruised and wounded, and sustained other injuries. To this declaration, the defendants below pleaded not guilty, on which issue was joined. The record states, that the cause was tried at the last Assizes at *Lancaster*, when the Jury found that two of the defendants below were not guilty, and that the other defendants were guilty, and assessed the damages of the plaintiff below against them, besides the costs and charges, at 50*l*. On this ver-

dict the Court of King's Bench have given judgment for the plaintiff below, that he do recover the damages and costs against the defendants below, who were so found guilty, and that the two for whom a verdict of not guilty was given do go without day. The only point for our decision is, whether this judgment be erroneous. On the part of the plaintiffs in error it was contended, that the statement of the case in the declaration amounts to a contract, and that being so, all the rules applicable to actions founded on contracts must govern this, and that it is a rule of law that such actions are joint, and must be maintained against all the defendants named in the declaration, or fail altogether. If it were true that the present action is founded on a contract, so that to support it, a contract between the parties to it must have been proved, the objection would deserve consideration. But we are of opinion, that this action is not so founded, and that on the trial it could not have been necessary to shew that there was any contract, and therefore that the objection fails. This action is on the case against common carriers, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey goods and passengers safely and securely, so that by their negligence or default no damage or injury happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, and which requires not the aid of a contract to support it. It appears by the different books of entries (*a*), that this form of action is of very ancient use. Nor is it material whether redress might or might not have been had in an action of *assumpsit*; that must depend on circumstances, of which the Court have no knowledge; but whether such action might or might not have been maintained; still this action on the case may be supported. The remedy by *assumpsit*, as applied to cases of this kind, is of modern use. The

(*a*) Brownlow's Redivivus, 11, 12. Clift, 38, 89. Mod. Ent. 145. Herne, 76.

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action on the case is as early as the existence of the custom or common law, as to common carriers. If the action be not founded on a contract, but on a breach of duty depending on the common law, on a *tort*, or misfeasance, it cannot be contended that the judgment is erroneous; for, from the nature of the case and the form of the action, it is several and not joint, and may be maintained against some only of those against whom it is brought. In this view of the subject, the authorities principally relied on by the plaintiffs in error have no application. The cases of *Powell* v. *Layton* (*a*), and *Max* v. *Roberts* (*b*), were decided by the same Judges; and are in no respect like the case now before us. Each of them were actions against owners of ships, not stated to be general ships, carrying the goods of all who chose to send them; but it is stated as a particular employment in each case. In the first, the declaration stated, that the plaintiff, at the special instance and request of the defendant, had caused goods to be delivered to him, to be carried and conveyed, &c. Now it is obvious, that this was a case founded on a particular contract; the Court therefore held, that the defendant's plea in abatement, that he had a partner jointly interested, to whom the goods were delivered, as well as to him, the defendant, was good, and that this person ought to have been joined. In *Max* v. *Roberts* the point in the cause was decided on the same principle, although the question arose in a different shape. There, the declaration stated, that the defendants were owners of a ship, and that the goods were shipped on account of the plaintiff, to be carried, &c. On the trial, he failed in proving that the defendant *Roberts* and the eight other defendants were part-owners; by his evidence he affected the eight only. The same Judges who decided *Powell* v. *Layton* held, that the owners had no duty imposed on them, but what arose by contract and adhered to their former decision in that case. Here, however, a duty was imposed on the defend-

(*a*) 2 New Rep. 365.——(*b*) Id. 454.

ants, which did not arise by contract, but by the common law, or custom of the realm. It is not material therefore, to contrast the decisions in *Powell* v. *Layton* and *Max* v. *Roberts* with the determination of the Court of King's Bench in the earlier case of *Govett* v. *Radnidge*, because this case differs from them. If these cases become opposed to each other, it must remain to be decided hereafter which of them is right. At present, it is sufficient to say, that this action is founded on a misfeasance, and that the declaration is framed accordingly; and therefore, that the verdict and judgment given against some of the defendants is not erroneous, and ought to be affirmed.

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My Brother *Wood*, although absent during the argument, concurs in opinion with the rest of the Court.

Judgment affirmed.

POCOCK and Another *v.* The BISHOP of LINCOLN, VINCENT, PEARCE and ASTON.

Wednesday, July 11.

QUARE *Impedit*.—The declaration stated, that one *Richard Pearce*, Esq. now deceased, was, in his life-time, to wit, on the 1st *November*, 1790, seised of the advowson of the church of *Husbands Bosworth*, in the county of *Leicester*, as of an advowson in gross by itself as of fee and right, and that being so seised thereof, he afterwards, to wit, on the 2nd *December*, 1790, presented to the said church, being then vacant, *Richard Pearce*, clerk, his son, who on the said

Under this devise "I do give to my son *Richard* the perpetual advowson of *Husbands Bosworth* in *Leicestershire*, and my manor of *Stanwick*, and all my lands in *Northamptonshire*:" Held, that an estate for life only in the advowson passed to the devisee, although he was the incumbent of the living at the time the will was made, and one of the residuary legatees;—on the ground, that the words "perpetual advowson" were only descriptive of the thing devised, and not as denoting the quantity of interest which the devisee was to take therein.

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presentation of the said *Richard Pearce* the father, was admitted, instituted and inducted into the same; that the said *R. P.* the father, being so seised of and in the said advowson, on the 20th *May*, 1795, made his will in writing, duly executed to pass real estates, and thereby amongst other things gave, devised, and bequeathed unto his son *Richard Pearce*, the said advowson, for the term of his life, and on the 10th *January*, 1800, died, so seised of the said advowson;—that thereby, and under the will of *R. P.* the father, his said son *Richard* became seised of and in the same, for his life, and that upon the death of the father, the reversion in fee of and in the same, expectant upon the decease of the said *Richard Pearce* the son, descended and came to *Thomas Pearce*, the eldest son and heir of the said *R. P.* the father; that the said *Richard Pearce* the son, being so seised, the church became void by his resignation, who, on the 7th *December*, 1813, presented to the said church, being then vacant, *William West Green*, clerk, who on such presentation was admitted, instituted, and inducted into the same. That the said *Thomas Pearce* the son, being so seised as of fee in the reversion of the said advowson, on the 6th *January*, 1801, made his will duly executed to pass real estates, and thereby, amongst other things, gave and devised his said reversion therein to *John Crutchfield* and *John Emmett* and their heirs. That the said *Thomas Pearce*, on the 22nd *November*, 1802, died so seised of the said reversion in the said advowson, without altering his will, by reason whereof *Crutchfield* and *Emmett* became seised of the reversion therein in fee, and that being so seised, *Emmett*, on the 8th *March*, 1812, died, leaving *Crutchfield* him surviving, and thereby he became seised of the reversion in fee. That on the 3rd *January*, 1814, the said *Richard Pearce* the son died, and thereupon *Crutchfield* became seised in fee in the said advowson; and that being so seised, he *Crutchfield*, on the 12th *June*, 1816, died, leaving *William Slade* his cousin and heir at law, him surviving; that thereby *Slade*

became seised of the said advowson, and being so seised, he, on the 4th and 5th *August*, 1817, by indentures of bargain, sale, and release, conveyed the same to the plaintiffs in fee, and that they being so seised thereof, the church, on the 22nd *June*, 1820, became vacant by the death of the said *William West Green*, and being so vacant, the same hath ever since continued, and still is so; and by reason of the last-mentioned premises, it belonged, and now belongs to the plaintiffs to present a fit person thereto, but that the defendants will not permit them, but unjustly hinder them from so doing.

To this declaration, the bishop, by his plea, disclaimed all title, save only as ordinary, to admit, institute and displace the parsons of the said church. The other defendants pleaded, that *Richard Pearce* the father, being seised of the advowson of the said church in fee, on the 2nd *September*, 1790, presented his son *Richard*, who was thereupon admitted and inducted into the same: that the father being so seised, on the 20th *May*, 1795, made his will in writing, duly executed and attested, in the following words, that is to say: "I, *Richard Pearce*, of, &c. do give and dispose of all my worldly goods it hath pleased God to bless me with, as follows:—I give to my son *Thomas*, the manor of *Flamstead*, and all my lands in that parish, and *Martin*'s Farm, in the parish of *Redburn*, and all rents that shall be due at my death; but if no child born in wedlock, then I do give the above to my son *Richard*; and if he should leave no child born in wedlock, then I do give the same to my son *Zachary*; and if he should leave no child born in wedlock, then I do give all my lands and estates in the counties of *Hertford* and *Middlesex*, to my daughter and her heirs.—"I do give to my son *Richard* the *perpetual advowson* of *Husbands Bosworth*, in *Leicestershire*, and my manor of *Stanwick*, and all my lands in *Northamptonshire*." I do give my son *Zachary*, all my freehold houses, and all my leasehold houses at my death, that are no part of the

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trade, that are in *Westminster*, or the county of *Middlesex*, the rents and profits to be laid out in four *per cents.*, in trustees names for his use. I do give to my daughter, my dwelling-house at *Redburn*, and all other houses and lands that I now have, or may have at my death, with all goods, plate, &c., and all my long and short annuities, bank stock, five *per cents.* and reduced three *per cents.* standing in my name at my death. I do give all my *South Sea* annuities, to my son *Richard Pearce.* And then after giving his son *Thomas*, three parts of his trade, and his son *Zachary*, one fourth, and various bequests and legacies to his relations, friends, and servants, the will concluded as follows. " I do appoint my son *Thomas*, and my son *Richard*, and my daughter *Mary*, joint executors and residuary legatees to this my will."—The plea then proceeded to state, that *R. Pearce* the father, died on the 10th *January*, 1800; that under his will, *Richard*, the son, took and became seised of an estate in fee in the advowson; and that being so seised, he, on the 30th *March*, 1813, devised it to the defendants, their heirs and assigns: that *Richard*, the son, died so seised, without altering his will, and that therefore the defendants became seised as of fee and of right of and in the advowson, for which reason they prevented, and at present hinder the plaintiffs from presenting a fit person to the said church. To this plea the plaintiffs demurred generally, and the defendants joined in demurrer.

The case came on for argument on a former day in this Term, when

Mr. Serjt. *Bosanquet*, for the plaintiffs, submitted, that the only question raised by the demurrer was, whether *Richard Pearce*, son of the testator, took an estate in fee or not in the advowson of *Husbands Bosworth*, under his father's will? He submitted, that he took an estate for life only. It is a clear principle of law, that in all deeds and wills, a limitation or devise of an estate in general terms, and without any words expressive of the interest grantees or devisees are

to take: *primâ facie* gives only an estate for life, and those persons who claim a larger interest, must shew that an estate has been conveyed or given beyond the life of the first taker. It must be admitted, however, that there is a distinction between deeds and wills; as in the former, strict and technical words are required, yet if there are no expressions in the latter, giving an estate of inheritance, or words tantamount to the disposition of such estate; or a plain indication on the face of the instrument for inferring an intention by the devisor so to do, nothing passes away from the heir at law beyond an estate for life. Devisees, and the interests they are to take, may be described by different words, and in a variety of terms: and although land be devised generally, without words of limitation, still, if the devisee is charged in respect thereof, with the payment of a gross sum of money, or of debts, or annuities, he will take the fee-simple; for it is inconsistent that he should take a life estate only, as he might die before he could be compensated out of the land, and so the devise, instead of being a benefit to him, might be a loss. Here, however, the devise is in general terms, and for no particular or specific purpose, and therefore the question is reduced to one simple point, *viz.* whether it was the manifest or apparent intent of the testator, that a larger interest than an estate for life in the advowson, should pass to his son *Richard*; or whether there are any words in the will equivalent to pass a fee, as in a deed. The word "advowson" in a will, does not of itself import, that more than a life estate should pass than it would in a deed, to which it would be clearly limited, unless express words of inheritance were adopted. In *Coke Littleton* (*a*), where *Littleton* treats of the effect of the word "heirs" to make an estate of inheritance, Lord *Coke*, in commenting on that section, observes(*b*), that "*Littleton*, there, and in many other places, putteth lands but for an example; for his rule extendeth to seigniories, rents, *advowsons*, commons, estovers,

(*a*) Sect. 1.——(*b*) 4 (a).

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and other hereditaments, of what kind or nature soever." In *Davis* v. *Kempe* (*a*), Lord Chief Justice *Bridgman* said, "It is a rule in *Wild*'s case, 6 *Rep.* fol. 16, to make construction of wills, according to estates at common law by deed, unless something in the intent of the will appear to the contrary;" and in that case (*b*), it was resolved, that the intent of the testator ought to be manifest and certain, and not obscure or doubtful; for that at the common law lands were not devisable, but only by custom.

So, in *Bale* v. *Coleman* (*c*), Lord Keeper *Harcourt* observed, that "the intent ought to govern, but then this must be a manifest and certain intent, and not an arbitrary one: It must be according as it appears upon the will, and according to the known rules of law: it is not to be left to a latitude, and as it may be guessed at." A mere bequest of an "advowson," therefore, by a father to his son by will, gives the latter a life estate only, as a greater interest would not pass to him in case such word had been adopted in a deed. An advowson may either be conveyed in fee, or limited for life or years, as any other incorporeal hereditament; and it is quite clear, that a devise of common of pasture, or tithes, would give only an estate for life, if unaccompanied with words of inheritance. It is unnecessary to cite authorities as to the effect of the introductory words of the will; it is sufficient to refer to what fell from Lord Chief Baron *Thomson*, in delivering the judgment of the Court of Exchequer, as to the construction of this same instrument, in *Doe*, d. *Crutchfield* v. *Pearce* (*d*), where he observed, "it was argued, that the intention to give a fee was further manifested by the introductory words, which declared the object of his will to be the gift and disposal of all the testator's worldly goods, and that those words shewed that whatever he afterwards devised, he meant to give absolutely. There certainly are many cases where introductory words, to the full as strong as these in this will, have been construed not to extend to

(*a*) Carter, 5.——(*b*) 6 Rep. 16.——(*c*) 8 Vin. Abr. tit. Devise, D. (b.) pl. 7.——(*d*) 1 Price, 365.

carry a fee, and so it has been accordingly often decided; and to establish that position numberless cases have been cited, some of which are not very applicable:" and after adverting to the case of *Roe*, d. *Kirby* v. *Holmes* (*a*), he said, "the same may be observed here, the testator having also used words of limitation in the devise over to his daughter; and from the omission of those words it appears, that it was not his intention to give a further interest." Although the judgment of that Court was confined to the manors and lands devised to the testator's son *Richard*, it is equally applicable to the advowson in question. In *Roberts* on *Wills* (*b*), it is said, that with respect to the force and operation of the preamble and introductory words in a will, it is at length clearly settled, that although they make profession of disposing of all the testator's property in the fullest manner, they will not operate to carry the words of the devising clause beyond their legal sense and signification." In *Ibbetson* v. *Beckwith* (*c*), where considerable stress was laid by Lord *Talbot* on the introductory words, the testator devised by the word "estate;" and in *Denn*, d. *Gaskin* v. *Gaskin*, where the testator expressed his intention to dispose of all such worldly estate as he was endued with, Lord *Mansfield* said (*d*), "I suspect extremely, that in this very case the testator meant to give his nephews a fee in the premises in question; for he had no other landed property. He makes them residuary legatees of his personalty, and gives a disinheriting legacy to his heir at law."—Another question here arises on the introduction of the word "perpetual" before that of "advowson;" but it is only descriptive of the thing in which the testator had an inheritance, and not the interest he possessed in it. An advowson is styled "perpetual" if the right of presentation continues in the same person whenever the living may become vacant; but a patron may not have the sole right of presentation, as in the case of joint interests, where each presentation must

(*a*) 2 Wils. 30.——(*b*) Vol. 1, 2d edit. page 496.——(*c*) Cas. temp. Talb. 157.——(*d*) Cowp. 659. S. C. 2 Doug. 760, n.

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be made alternately, according to the respective rights of the parties. A patron, therefore, may have an estate in fee in a perpetual advowson, and yet not have a perpetual right to present. So, a patron may limit a perpetual advowson, by giving another an estate in it for a term of years, or for life; in which case, the taker will have a right to present during the term, or as long as his interest continues. "Perpetual," therefore, is merely applicable to the nature of the thing, and not to that of the inheritance. In *Doe*, d. *Wood* v. *Wood*, where the testator devised all the rest of his farms, lands, tenements, and buildings, and a perpetual advowson, Mr. Justice *Bayley* said (*a*), "the former part of the devise of all his farms, lands, tenements, and buildings would not give more than an estate for life: nor would the words "perpetual advowson" carry it any further; for the word "perpetual" applies only to the description of the property, and not to the *quantum* of interest which the devisee takes in it." So, Chief Baron *Thomson*, in *Doe*, d. *Crutchfield* v. *Pearce*, observed (*b*), that "perpetual advowson does not carry it further than advowson: any thing short of advowson is the next presentation. An advowson, as well as other property, is capable of being limited for life, and in that case, the devisee might present during life *totics quoties*." The cases which have been decided as to the meaning of the word *hereditament*, are in principle applicable to the present, and although it is a strong word to import an inheritance, still, it will not of itself pass an estate in fee. In *Denn*, d. *Moor* v. *Mellor*, Lord *Kenyon* said (*c*), "It has been contended that the wife of the devisor took a fee, because the word "hereditaments" is used in the devise to her; but the cases cited shew that that word is not sufficient to pass a fee, and those cases are not opposed by any one judicial authority;" and that doctrine was afterwards admitted by Lord Chief Justice *Eyre*, in the same case, in error (*d*), and established by Chief Baron *Macdonald*, in the House of Lords (*e*).

(*a*) 1 Barn. & Ald. 523.——(*b*) 1 Price, 361, 2.——(*c*) 5 Term Rep. 563.——(*d*) 1 Bos. & Pul. 562.——(*e*) 2 Bos. & Pul. 251.

So, in *Doe*, d. *Small* v. *Allen*, Lord *Kenyon* said (*a*), "the next point arises on the word 'hereditaments,' and I am astonished that any doubt should ever have been entertained about that. It is not so strong a word as 'tenement:' it is merely a description of the thing itself, and not of the quality of it, or the interest in it." That is precisely the point in this case, and the testator has coupled the advowson in *Leicestershire* in the same sentence with his manor and lands in *Northamptonshire*, as being descriptive of the property he intended to devise, and not the interest he had in those estates; and the Court of Exchequer held, that even if the devisee had taken an estate in fee in the advowson, it would not have altered or extended the effect of the subsequent devise of the lands (*b*). If a testator were to devise his "fee-farm rents," they would merely be descriptive of the property, as in the case of a perpetual advowson, and only an estate for life would pass; but if he were to devise his "rents in fee," it would be sufficient to pass an estate in fee simple. In *Lovenacres*, d. *Mudge* v. *Blight* (*c*), where the testator gave an estate to his son, whom he appointed his executor, freely to be possessed and enjoyed;—it was held to pass a fee, there being a charge on the devisees which might last longer than their lives, and therefore, that the words "freely to be possessed" could not mean only free of incumbrances; but in *Goodright*, d. *Drewry* v. *Barron* (*d*), where similar words were used, and the testator had not charged his estate, the Court held that they carried nothing to the devisee beyond an estate for life. So, in *Peiton* v. *Banks* (*e*), where a testator devised lands to his wife for life, reversion to *A.* and *B.*, to be equally divided between them;—it was held, that they were tenants in common for life only; and yet the word "reversion" points to an estate in fee. It is true, that here the devisee was the incumbent at the time of the devise, but he was not tenant for life of the advowson; and by the words of the will he was

(*a*) 8 Term Rep. 503.——(*b*) See 1 Price, 353.——(*c*) Cowp. 352.——(*d*) 11 East, 220.——(*e*) 1 Vern. 65.

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enabled to present in case of a vacancy, *toties quoties* during his life.

Mr. Serjt. *Vaughan*, for the defendants,—The devisee *Richard Pearce*, took a larger interest than an estate for life in the advowson in question; for although a general devise of lands to him would only give him such an estate, yet a devise of an advowson has a more extensive operation. There is a manifest distinction between corporeal and incorporeal hereditaments, and the authorities and principles relied on for the plaintiffs do not apply to a devise of the latter description. In *Doe*, d. *Crutchfield* v. *Pearce*, the judgment of the Court of Exchequer was confined entirely to the testator's manor and lands in *Northamptonshire*, and therefore the expressions which fell from the Chief Baron in the course of the argument, as to the advowson, must be considered as *obiter dicta*. If the devisee is to derive no aid from the introductory words, or residuary clause in the will, which clearly import that it was the intention of the testator that he should enjoy more than a life interest, recourse must be had to the words "perpetual advowson," which are of themselves descriptive of the interest he was to take, and not the description of the property devised. An advowson is not only different from an interest in lands, but is distinguishable from all other incorporeal tenements; and although it may be aliened for life or for years, yet, from the close resemblance of its nature to that of a mere right, a division of it will not be presumed, unless the intention of dividing be distinctly expressed. In *Mackensie* v. *Robinson* (*a*), it was determined, that a mortgagee cannot present a clerk of his own choice, but must abide by the nomination of the mortgagor. So, a bankrupt patron shall present in preference to his assignees (*b*); nor can the committee of a lunatic present (*c*). In the writ of right of advowson, the thing

(*a*) 3 Atk. 559. 3 Cru. Dig. 1st edit. 26.——(*b*) Watson's Clergyman's Law, 3d edit. page 106. 3 Cru. Dig. 28 —— (*c*) 3 Cru. Dig. 31.

claimed is stated to be the "*advocatio*," and there is no claim of the inheritance in any technical words, as in other writs of right (*a*). Dr. *Johnson* states the meaning of the word "advowson" to be a right to present to a benefice. Dr. *Burn* states it to be the right of presenting a clerk to the bishop, as often as a church becomes vacant (*b*); and in *Cowell's Interpreter* the same definition is given; and he states, that it is as much as *jus patronatûs* in the canon law; and it is so laid down by Lord *Coke* (*c*). The *jus patronatûs* is not the mere right to present for one or more terms, but whenever a vacancy may occur, that is, *in perpetuum*. Any thing short of an advowson is only the next presentation. Advowson, then, being *nomen generalissimum*, must be intended to pass a fee, and it lies on the plaintiffs to restrain the operation of the words "perpetual advowson," which by themselves import the general or whole right of presentation. *Bracton* calls the patron, *advocatus ad quem pertinet jus advocationis alicujus* (*d*); and so *Fleta*, almost *totidem verbis*, using the word *jus* (*e*); and *Britton* terms an advowson *jus patronatûs* (*f*), thereby importing an unrestricted right of possession, and not merely the next presentation, but the whole interest. Here, the word "perpetual" is prefixed to that of "advowson;" and in *Robinson* v. *Robinson* (*g*), where the testator devised the perpetuity of his presentations to *L. H.* for his life, and no longer, and after his decease, to such son as he should have, lawfully to be begotten, and for default of such issue, then to the testator's right heirs;—it was held, that *L. H.* took an estate tail. Here, too, the devisee was the incumbent at the time of making the will, and the testator thereby intended to confer on him a further benefit, by conveying all the interest he had in the advowson to him in fee. Although a devise of hereditaments will not convey an estate in fee, it will at all events pass an advowson (*h*). In *Coke*

(*a*) Registrum Brevium, 29, b. Fitzherbert Nat. Brev. 30.——(*b*) See Burn's Eccl. Law. 7th edit. page 4.——(*c*) Co. Lit. 17 b. 119 b.——(*d*) Book 4, fol. 240.——(*e*) Book 5, c. 14.——(*f*) Cap. 92.—(*g*) 1 Burr. 38.——(*h*) 3 Dyer, 323 (b), pl. 30.

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Littleton (*a*), it is said, if a man devises a tenement to another by will, *habendum sibi in perpetuum*, and dies, and the devisee enter, he hath a fee-simple, yet, if a deed of feoffment had been made to him by the devisor of the same tenements, *habendum sibi in perpetuum*, and livery of seisin were made; upon this, he should have only an estate for life. There the distinction was drawn between a feoffment and will, which shews, that though the fee would not pass by the one, still it might by the other. The forms of a grant of a perpetual advowson, and a next avoidance, are given in *Burn's Ecclesiastical Law* (*b*), from which it appears, that an advowson is a right of patronage in fee. At all events, the testator intended to provide for all his children, and such intention cannot be carried into effect, unless his son *Richard* takes an estate in fee in the advowson, and he being the incumbent before and at the time the will was executed, is *primâ facie* evidence that his father meant to give him the largest possible interest in it.

Mr. Serjt. *Bosanquet* in reply.—Even if the word "advowson" *ex vi termini* conveys a right of presentation in fee, still, it must be governed by the same rule as is applicable to lands or grants of real property, by which the fee cannot be conveyed unless words of inheritance are used; and *Coke Littleton* (*c*), is expressly in point to that effect. So in *Wild's* case, it was resolved (*d*), that at the common law lands were not devisable; but by the statute 32 & 34 *Hen.* 8. all lands according to the purview thereof were devisable. The common law, therefore, did not convey an advowson beyond the life of the alienee, without express words; nor will it pass by will, unless there be words contained in it, from which it must be inferred, that it was the manifest intent of the testator that a larger interest or the fee should pass. The *habendum*, in the form of the grant of a per-

(*a*) Sec. 586.——(*b*) 7th edit. 48. 50.——(*c*) Note 4. (a).——(*d*) 6 Rep. 16.

petual advowson, in *Burn's Ecclesiastical Law* (*a*), is "to hold it to the grantee, his heirs and assigns, to and for the sole and only proper use and behoof of the grantee, his heirs and assigns for ever, and to and for no other use, intent, or purpose whatsoever." That, therefore, is according to the rule laid down by *Littleton*, as applicable to lands. It has been said, that the meaning of the term "advowson" is *jus patronatûs*, which gives a right of presentation in fee, whenever a vacancy may occur; but that does not follow, as it may be limited for life or for years. It does not appear that the testator was an unlettered person at the time of making his will, and it is not expressed upon the face of it, that his intention was to give his son *Richard* any more than an estate for life, and although the word "perpetual" is prefixed to that of "advowson" it makes no difference, as it is only descriptive of the thing devised. The case cited from *Dyer*, is altogether inapplicable to the present, as it merely decided, that an advowson would pass under a demise of hereditaments.

Cur. adv. vult.

There being a difference of opinion on the Bench, the Judges, on this day delivered their opinions *seriatim* as follows:—

Mr. Justice RICHARDSON, after stating the substance of the declaration and pleas proceeded thus:—The question raised by the demurrer is, whether, by the devise in the will of *Richard Pearce* the father, of the "perpetual advowson of *Husbands Bosworth*, in *Leicestershire*," an estate in fee or for life only, passed to *Richard* the son? If the fee passed to him, the defendants are entitled to it as his devisees; but if an estate for life only passed, then the reversion descended to *Thomas Pearce*, as the eldest son and heir of the testator, and consequently the plaintiffs as claiming under him are entitled. I am of opinion, that

(*a*) Page 48.

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under the terms of this devise, an estate for life only in the advowson passed to *Richard* the son. The sole and simple question is, whether the words "perpetual advowson," are descriptive of the estate devised, or the testator's interest therein. I think they are descriptive of the former only. It has been insisted, however, in the argument for the defendants, that the word "advowson" imports a perpetual right to present, and would of itself pass a fee; and further that the testator meant to use it in this sense, by his prefixing the word "perpetual" to it. The latter part of the argument appears to me to be considerably weakened by the former; for if the word "advowson," in itself, imports a perpetuity of right, the addition of the word "perpetual" only expresses what must otherwise be implied, and extends the sense no further. So, if a person had a limited interest in an advowson, and conveyed it without being accompanied by the word "perpetual," it must be implied that he had a perfect claim. Although an advowson may be a *jus patronatûs*, it does not follow that it gives a right of presenting in *perpetuum* whenever a vacancy occurs, for such presentation may be severed from the advowson. It seems to me, that "perpetual advowson" means the same as "advowson," each giving a right of presentation, not confined to one or any definite number, but to be exercised as often as a vacancy may happen. The adoption of the word "perpetual," therefore, carries it no further than if the term "advowson" alone had been used; but it is quite clear that an advowson, or perpetual advowson, may, like other descriptions of lands, be limited for terms of years or for life, in tail or in fee, according to the nature of the estate or interest in the person who has the right to present. If an advowson, *ex vi termini*, of itself imports a fee, it must fall within the rule applicable to all grants of real property, whether in deeds or in wills, where an estate of inheritance is intended to pass; and if a thing be conveyed or devised generally, the grantee or devisee takes only an estate for life. If, there-

fere, an advowson be assimilated to land, it is quite clear that the interest of the first taker in a case like the present, will consist of a life estate only. In *Littleton* (*a*), it is laid down, that "if a man would purchase lands or tenements in fee-simple, it behoveth him to have these words in his purchase, 'To have and to hold to him and his heirs;' for these words (his heirs) make the estate of inheritance.—For if a man purchase lands by these words, 'To have and to hold to him for ever;' or by these words, 'To have and to hold to him and his assigns for ever;' in these two cases he hath but an estate for term of life;" and the authority of Lord *Coke*, in his commentary on that section is expressly in point, for he observes, that *Littleton*, there and in many other places, putteth lands but for an example, for that his rule extended to seigniories, rents, *advowsons*, commons, estovers, and other hereditaments of what kind or nature soever." The word "hereditaments," in itself, imports the thing granted, and not the *quantum* of interest a devisee is to take therein. This was decided by the Court of King's Bench and in the House of Lords, in the case of *Denn*, d. *Moor* v. *Mellor*, although the Judges in the Exchequer Chamber seemed to have entertained a different opinion. It appears by the case in *Dyer*, that a lease of hereditaments will pass an advowson; so it will pass by a devise of hereditaments; still, however, such a devise, without more, will give the devisee an estate for life only. Suppose a person were seised in fee of an advowson and lands, and were to grant or devise them under the term of "all his hereditaments;" it is perfectly clear that such lands would pass to the first taker, an estate for life only. Nor would the advowson pass a greater interest, although such taker might happen to die before any vacancy should accrue. It has been insisted, that the meaning of the term "advowson" confers a right of presentation whenever a vacancy occurs; and further, that it imports,

(*a*) Sec. 1.

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that such a right of presentation must continue in *perpetuum*. In cases of tithes, the right to the tenth part accrues as they arise. They are an incorporeal hereditament, and under a devise of them, in general terms, a devisee would take only an estate for life, although he might die before any tithes should become due. So, also, in the case of rents. It therefore appears to me, that "advowson," or "perpetual advowson," imports the same thing, and must be governed by the same rule as is applicable to lands; and that a devise of either in general terms, must receive the same construction as the word "hereditaments," which is not equivalent to pass the inheritance in a will, or give any thing more to the devisee than an estate for life. It seems to me, that it would be extraordinary if the advowson should pass a fee to the devisee, and yet that he should have but an estate for life in the manor and lands. The Court of Exchequer held, that he only took such interest in the latter, and that decision appears to be most proper; and although the Chief Baron in pronouncing the judgment of the Court, confined their opinions to the devise as to the lands only, yet, it is manifest from what fell from him in the course of the argument, that he thought that the devisee would only take an estate for life in the advowson as well as in the lands. I most fully express my concurrence with that part of the judgment as to the construction put on the introductory words in the will. On these grounds, therefore, I am of opinion, that an estate for life only passed to *Richard Pearce* the son, and consequently that the plaintiffs are entitled to judgment.

Mr. Justice BURROUGH.—The only question for the decision of the Court is, whether the testator has by his will, devised the perpetual advowson of *Husbands Bosworth*, to his son *Richard*, in fee or for life, under which will he also devised a manor, and certain lands to his son *Thomas*; but if he should have no child, then to his son *Richard*; and in case of failure of issue by him, then he gave all his estates in

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Hertford and *Middlesex*, to his daughter and her heirs; and the will then contained the devise on which this question arises, *viz.* "I do give to my son *Richard*, the perpetual advowson of *Husbands Bosworth* in *Leicestershire*, and my manor of *Stanwick*, and all my lands in *Northamptonshire*; and then followed a devise of certain freehold and leasehold houses to his son *Zachary*. This will, as to the devise to *Richard*, of the manor of *Stanwick*, and all the testator's lands in *Northamptonshire*, has been considered by the Judges of the Court of Exchequer, who were unanimously of opinion that he took only an estate for life in those lands, as there were no auxiliary words in the will to give him a greater interest than such an estate; but it appears they have given no express opinion as to what estate he took in the advowson; but it is obvious, if he had taken a fee therein, that it might have been urged with great force, that he took a similar estate by a devise of the lands immediately following, and in the same sentence of the will. In the course of the argument the Lord Chief Baron said (*a*), that "perpetual advowson" does not carry it further than advowson; any thing short of advowson is "the next presentation." What was observed by Mr. Justice *Bayley*, in the case of *Doe*, d. *Wood* v. *Wood*, tends very strongly to confirm this position. There, the devise was to *Henry Wood*, of all the rest of the testator's farms, lands, tenements, and buildings, and the perpetual advowson of *Rusper Rectory* to be kept in the family and name of the *Woods* as long as could be; and the Court held, that *Henry Wood* took an estate of inheritance, as he must take more than an estate for life, to enable him to keep it in the name and family of the *Woods* as long as could be; and Mr. Justice *Bayley* there said "the former part of the devise of all his farms, lands, tenements, and buildings, would not give more than an estate for life, nor would the words "perpetual advowson" carry it any further; for the word "perpetual" applies only to the description of the property, and not to the *quantum* of in-

(*a*) 1 Price, 361.

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terest which the devisee takes in it." Nothing has been said to contradict that doctrine by either of the three other learned Judges in that case, and from their silence it must be assumed that they assented to it. The question then is, what is the effect of the words "perpetual advowson," contained in this will? As to their carrying a fee, it has been said, that in a writ of right of advowson, it is demanded in the writ by the name of advowson only; but when the purpose of that writ is considered, as well as the count therein, it appears to me to have altogether a different operation. By the writ, the demandant demands the thing, as manor, messuage, land, or advowson, without adverting to the extent of his interest, and the count expresses the interest of the demandant in the thing sought to be recovered, after stating the writ which demands it in general terms; and in *Coke Littleton* (*a*), it is said, "of an advowson and such like, a man shall plead that he is seised *de advocatione ut de feodo et jure.*" An advowson being an incorporeal hereditament, the demandant cannot say he was seised *de feodo et jure*, but "*ut*" *de feodo et jure.* In *Gibson's Codex* (*b*), it is said, "that an advowson being an inheritance incorporeal, and not lying in manual occupation, cannot pass by livery; but may be granted by deed, or by will, either for the inheritance, or for the right of one or more turns, or for as many as shall happen within a time limited." It has frequently been said of the author of that work, that he was an excellent common lawyer, and from the above passage, it must be inferred, that a mere devise of an advowson in general terms would not pass the inheritance in it, or give to the devisee a larger interest than an estate for life. In *Blackstone's Commentaries* (*c*), it is stated, that an advowson will completely illustrate the nature of an incorporeal hereditament. Therefore it will pass under the word "hereditaments" in a will. In *Coke Littleton* (*d*), it is laid down "that hereditament is the largest word of all

(*a*) 17 (b).——(*b*) Vol. 1. 758, s. 5. S. P. Burn's Ecclesiastical Law, 7th edit. page 11.——(*c*) Vol. 2. page 21.——(*d*) 6 (a).

in that kind; for whatsoever may be inherited, is an hereditament, be it corporeal or incorporeal, real or personal, or mixed." In *Doe*, d. *Small* v. *Allen*, Lord *Kenyon* said (*a*), "The next point arises on the word 'hereditaments,' and I am astonished that any doubt should ever have been entertained about that; it is not so strong a word as 'tenement;' it is merely a description of the thing itself, and not of the quality of it, or the interest in it;" and his Lordship appears to have entertained the same opinion in *Doe*, d. *Palmer* v. *Richards*, where the testator devised all the rest, residue, and remainder of his lands, hereditaments, goods, and personal estate; and his Lordship observed (*b*), that "those words alone were not sufficient *in law* to carry a fee." He was fortified in that opinion by the language of Lord Chief Justice *Trevor*, in *Hopewell* v. *Ackland* (*c*), *viz.* that "the word 'hereditament' cannot be taken to denote the measure or quantity of estate;" and in *Canning* v. *Canning*, the Master of the Rolls said (*d*), that "the law is now settled in the case of *Hopewell* v. *Ackland*, that a fee will not pass by the word 'hereditament;'" and in *Doe*, d. *Palmer* v. *Richards*, the three other Judges declined giving any opinion upon the construction of the word "hereditaments," as it was not necessary to the determination of that case. Thus, then, it appears that the word "hereditaments" in a will, may pass an advowson; but not a fee, without more being added. It therefore follows, that it cannot of itself pass a fee in an advowson, within which it is comprehended, because it is only the description of the thing, and not of the quantity of interest the devisee is to take; and this accords entirely with the *dictum* of Mr. Justice *Bayley* in *Doe*, d. *Wood* v. *Wood*. It is a settled rule of law, that in the construction of wills, there must be words of limitation to pass a fee, or some expressions of the testator denoting his intention that the entire interest should pass to the devisee; and unless

(*a*) 8 Term Rep. 503.——(*b*) 8 Term Rep. 358.——(*c*) 1 Salk. 239.
(*d*) Mosely, 242.

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some words are used which the law considers sufficient to carry a fee, he can only take an estate for life. In *Doe*, d. *Palmer* v. *Richards*, the testator devised all the rest of his lands, hereditaments, goods, and personal estate whatsoever; his legacies and funeral expences being thereout paid; and as the estate was charged thereby, and all the legatees might call on the devisee for their demands, it was held, that he took an estate in fee. Here, however, there is nothing on the face of the will which requires that a fee should pass. Although the devisee was the incumbent at the time it was made, it does not follow that he must take an estate in fee, for a benefit passed to him by the devise, and he had an opportunity of exercising it by presenting another person to the church on his own resignation. The testator, in default of issue by his sons *Thomas* and *Richard*, devised all his lands and estates, to his daughter and her heirs. It is a well known principle of law, that an heir cannot be disinherited, except by express words of limitation;—words tantamount to them, or necessary implication to be collected from the whole of the will itself, in which the intent of the testator ought plainly to appear. Taking, therefore, the whole of this will together, I think there is no ground for us to infer that the testator meant that more than a life estate in the advowson should pass to his son *Richard*, and consequently that the plaintiffs are entitled to judgment.

Mr. Justice PARK.—Although I am so unfortunate as to differ from my two learned Brothers who have preceded, and I believe also from my Lord Chief Justice, who is to follow me, I do not feel it necessary to state the grounds on which I have founded my opinion at any considerable length. The words in the will of the testator, who died in 1800, have been so frequently stated, that I shall not repeat them, but proceed to the question at once, which is, whether under the terms of the devise therein, the perpetual advowson of the church of *Husbands Bosworth*, passed an estate to his son *Richard*, in fee, or for life only. It does not appear to me

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to be necessary to discuss the precise meaning of the word "advowson," or whether, in a deed, it would *ex vi termini*, carry the whole interest in fee; or whether, if less than the whole was intended to be conveyed, which it clearly might be by the person seised of the whole, there should not be words of restriction, such as in tail, for life, or the next or following presentation, as indicative of the intention of the party conveying On looking at the foundation of the right of advowson, it would appear to be so, for Lord *Coke* observed (*a*), that "advowson," *advocatio*, so called, because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church; and therefore they were called *advocati*; they were also called *patroni*, and thereupon the advowson is called *jus patronatûs:* and in one word, advowson of a church is the right of presentation, or collation to the church." The *jus patronatûs*, according to this explanation, is the same as advowson; and it seems to me, that the *jus patronatûs*, unless it has restrictive words, embraces the whole, and cannot be confined to the next right of presentation; and in common parlance it certainly does so. But as I have before observed, it is unnecessary for me to give any opinion as to the meaning of the word "advowson" in a deed, where no words of inheritance are used. I shall assume that Lord *Coke* was right when he said (*b*), that "the rule laid down by *Littleton*, as applicable to lands, extends to *advowsons* and other hereditaments of every description, and that words of inheritance must be added to them to make them pass an estate in fee;" but it must be observed, that he, as well as *Littleton* before him, were only treating of the necessity of words of inheritance in a purchase, as the former termed it; that is, in a deed. I admit, that if words of inheritance are omitted in a deed, the word "perpetual" being joined with, or prefixed to that of "advowson," will not carry it further; for that may not be its import in legal acceptance; and Lord Chief Baron *Thompson* must be considered to have thought

(*a*) Co. Lit. 119 (b).——(*b*) Id. 4 (a).

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so, when he said, that "any thing short of advowson is the next presentation;" a *dictum*, which by those who contend that the word "advowson" carries the whole, may be supposed to favour their interpretation. Mr. Justice *Bayley* also appears to have supposed, that the word "perpetual" is descriptive of the property only, and not of the *quantum* of interest which the devisee takes in it. To the extent of this proposition I cannot subscribe, considering that word as being used by a testator in the disposition of his property. Having admitted thus much, it must now be conceded to me, that though there are many words which will not carry a fee in a deed, yet they may do so in a will, if the terms used therein are sufficient to shew that it was the intent of the testator that such an estate should pass. In *Doe*, d. *Wood* v. *Wood*, the words "perpetual advowson," were held to pass an estate of inheritance to the devisee, in order to carry into effect the intention and purpose of the testator. It is true that the words in this will are not near so strong as those used by the testator in that case. I only cite it for the purpose of shewing, that under certain circumstances, the words "perpetual advowson" in a will, may pass the fee to the devisee. It cannot be contended, (although the devise of the advowson in question is followed in the same sentence, by a devise of the testator's manor, and all his lands in *Northamptonshire*, of which lands it has been held in the Court of Exchequer, that the devisee took but an estate for life), that therefore the devise of the advowson cannot confer the absolute interest on such devisee, so as to enable him to take an estate in fee. Lord Chief Baron *Thompson* expressly declared the contrary; for in delivering the judgment of the Court in that case, he said (*a*), "Even admitting that the words were sufficient for passing a fee, as to this part of the devise respecting the advowson, we are entirely of opinion, that it would not necessarily follow therefrom, that a fee also passed in the pre-

(*a*) 1 Price, 365.

mises for which the present ejectment is brought." His Lordship there seemed to rely mainly on the case of *Paice* v. *The Archbishop of Canterbury* (*a*), where the testatrix "gave and bequeathed to the Reverend *Henry Taylor* her farm and lands at *Royston*, to him, his heirs and assigns, for ever; and also gave and bequeathed to the said Reverend *Henry Taylor* her farm and manor of *Eythorne Court*;"—the Lord Chancellor held, that the devisee took an estate for life only in the latter devise; although, in the former part of the same sentence, he took an estate in fee; and although the two bequests were united by the words "and also." Here, it appears to me, we ought to look at the whole of the case to be collected on the face of the will, as well as the facts admitted by the pleadings. The introductory words of the will shew, that the testator meant to dispose of every thing he should die possessed of, and to devise absolutely; for they are, "I, *Richard Pearce*, do give and dispose *of all* my worldly goods it hath pleased God to bless me with, as follows." It must however be admitted, that introductory words, although extremely strong, have never been construed by themselves to convey a fee; but that the importance of clauses of that description, as manifesting an intention of complete and ultimate disposition, has been gradually declining in Courts both of law and of equity; yet, both Lord *Kenyon* and Lord *Ellenborough* admitted that they have some weight where the intent of the testator is doubtful, and where there are other words contained in the will to carry such intent into effect. In *Doe*, d. *Bates* v. *Clayton*, Lord *Ellenborough*, in adverting to the effect of clauses of this nature, observed (*b*), that "the construction might be considered as in a degree aided by the introductory words of the will, respecting the testator's worldly and temporal estate, &c. which are allowed to have some weight in cases where the intention of the testator is doubtful." So, in *Goodright*, d. *Baker* v. *Stocker*, Lord *Kenyon* said (*c*), that "though the general introductory words would have

(*a*) 14 Ves. 364.——(*b*) 8 East, 147.——(*c*) 5 Term Rep. 13.

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some effect in the construction of the subsequent devises, they would not of themselves have carried the fee." And, in *Doe*, d. *Wall* v. *Langlands*, Lord *Ellenborough* observed (*a*), that "very little inference of intention can be drawn from mere formal words of introduction; though we certainly find them in some cases called in aid, to shew that a man did not mean to die intestate as to any part of his property;—and the making a will at all may also be used as affording such an inference." I admit the latter part of the sentence weakens the force of the former; but here it appears to me to be manifest, that the testator *Richard Pearce* did not mean to die intestate, and that is the benefit I seek to derive in support of my opinion from those introductory words:—immediately after which, he devises a manor and lands to his son *Thomas*; in default of issue by him, to *Richard* the present devisee; and in default of issue by him, to his daughter and her heirs; and then follows the devise on which this question arises, *viz.* "I do give to my son *Richard* the perpetual advowson of *Husbands Bosworth*, in *Leicestershire*." Although in a deed, the introduction of the word "perpetual," as prefixed to that of "advowson," will carry the latter no further than if such latter word alone had been used, yet, where it is introduced into a will made by a person who must be supposed to be ignorant of the law, and as in common parlance those words are considered to mean *jus patronatús*, it seems to me to express the absolute interest in the thing, and are the same in effect as if the word "perpetuity" had been adopted. It may be considered as shewing the testator's intention to dispose of all the interest he had in the advowson to his son *Richard*, as if he had said, "meaning to dispose of all my worldly goods, I give the perpetual advowson of *Husbands Bosworth*, now belonging to me, to my son *Richard*;" that would imply all the interest he had in the advowson; and that he contemplated a perpetuity. The words are, "the perpetual advowson,"

(*a*) 14 East, 372.

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that is, the entire or absolute advowson. It must be further observed, that it appears from the will, that the testator meant to provide for all his children beyond the terms of their lives; but with the exception of the *South Sea* annuities, if he be held to have made no provision for *Richard* beyond an estate for life in the advowson in question, the latter will have no interest whatever beyond his life, as his brothers and sister have; as it has already been determined, that he only took such an estate in the manor of *Stanwick*, and all his father's lands in *Northamptonshire*. The strong point however, in this case, as to the intention of the testator to give the advowson to his son *Richard* in fee, arises from the fact stated in and admitted by the pleadings." The will was made in 1795, devising the advowson to the testator's son, who had been in the possession and the actual incumbent of the living, five years before, and deriving all its fruits, and which he must have received as long as he lived, unless he had resigned it, or was promoted to some station which would be incompatible with his holding it, in which case only, could he have had the power of benefitting a relation or friend. I cannot conceive it possible that the father should devise to his son that which at the time of making the will, and for five years before the latter had beneficially and fully enjoyed, and which, but for his own act, he must continue to enjoy during his life; and therefore could only exercise his *jus patronatûs* in the event of either of those instances happening, which I have before alluded to. Even without the aid of the will, he would be entitled to every benefit which if he be held only to take a life-estate, he would derive under it; for he was not only the incumbent five years before the will was made, but his father lived five years afterwards; and he must have resigned before he could have the right of presenting another. If he were to resign on account of ill health, it would not be a gift of a pecuniary nature or value, although it might be a satisfaction to him to present a friend; and if the devisee

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be considered to take an estate in fee in the advowson, it would be a provision for him and his family, by which he would be enabled to carve out a property for his children, by selling the advowson, or by vacating it to provide for one of his sons; and thus *Richard Pearce*, the devisee, would be placed on the same footing as his other brothers and sister. For these reasons, therefore, I am of opinion, that he took the advowson in question in fee under the will of his father, and consequently that there ought to be judgment for the defendants.

Lord Chief Justice DALLAS.—I am of opinion that by the words in this will an estate for life only passed. It is admitted that under those words in a deed, it would be clear, that such an estate only could pass; nor is it contended by my Brother *Park* that the word "perpetual" being prefixed to that of "advowson," would make any difference, or carry it further than that lattter word taken singly; and to this, the opinions expressed both in the Courts of Exchequer and King's Bench, directly go. What then is there in a will to justify a different construction, and to convert into a fee, that which in a deed would be clearly but an estate for life? Nothing, generally speaking, for the rule of construction must be the same, unless in the will itself there be found something to vary it. This narrows the case to the consideration of the particular will, and to the effect of the words to be found in it, having reference to the subject-matter. And here, the argument must turn upon the rule applicable to all cases of this description, *viz.* the question of intention as to be collected from the whole will. Now, as to the question of intent, the leading rule laid down in the books is this, that to carry the inheritance, the intention must be disclosed either by express words or clear and necessary implication; a doubtful or uncertain intent will not be sufficient to disinherit the heir at law. I think, that in this case a clear intent to pass an estate of inheritance does not

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appear; and therefore, that even if the intent were doubtful, such estate would not pass. Another leading rule is, that the construction of wills shall be made according to the rules of the common law in respect to estates limited or created by deed, unless there be something clearly to be collected from the will itself, disclosing a different intention in the testator. And this is stated and frequently referred to as a safe and fundamental rule. In one of the reported cases, the rule is again laid down in these terms: "The intent ought to govern, but then this must be a manifest and certain intent, and not an arbitrary one. It must be according as it appears upon the will, and according to the known rules of law; it is not to be left to a latitude, and as it may be guessed at (*a*)." This being premised, I come to the will in question; and first it is agreed, that no aid can be derived from the generality of the introductory words, for they would equally apply to lands, and the lands are devised generally; and in these it has been admitted that the devisee took an estate for life only. It has been also allowed, that no aid is to be derived from the residuary clause, nor from the probability of the testator not meaning to die intestate. Generally speaking, this would more or less apply to every case of partial intestacy, and no doubt, in many of such cases the probability is, that the effect given to the will is contrary to the intention of the testator. In the nature of things, a man is generally glad to give what he means to bestow, by express words, and not (if I may so express it) sullenly leave it to the silent operation of the law. If not in a majority of wills, yet, certainly in a great number, the construction is contrary to the probable intent. "Most people," said Lord *Mansfield*, "when they give their land, probably mean to give it absolutely, as they would give personal property, a horse, or a piece of plate." And to this observation, adopting it himself, Lord *Kenyon* has frequently and expressly referred. This, however, can only be matter of

(*a*) See *Ball* v. *Coleman*, Vin. Abr. tit. Devise (D. b.) 7.

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conjecture; and to guard against bare and vague conjecture, the rule prevails, that if there are no expressions in a will, giving in direct terms an estate of inheritance, nor any plain grounds for inferring an intention to give such estate, nothing passes away from the heir at law beyond an estate for life. In all these respects therefore, the argument in this case in favor of a fee, can derive no assistance whatever. On what other special or particular grounds then does it stand? In the first place, a distinction was attempted to be drawn at the Bar from the nature of the property itself; an advowson was said to be an incorporeal hereditament, differing from land; and true it does in itself differ from land, but it does not differ from it as to the rules of law, by which it is to pass in a will or in a deed. As to a deed, I have already said it stands on the same footing; and, in which it is quite clear that the words "perpetual advowson" would only pass an estate for life. Now, taken as an incorporeal hereditament, what is the effect? It operates as a description of the thing, and does not of itself denote the quantity of interest conveyed or given, and which must therefore range under the general rule. In *Hopewell* v. *Ackland*, Lord *Trevor* said (*a*), that "the word 'hereditament' cannot be taken to denote the measure or quantity of estate; because it has a proper meaning, and extends to annuities, advowsons in gross, &c.;" and in the subsequent case of *Canning* v. *Canning* (*b*), it was stated by the Master of the Rolls, that "the law is now settled in the case of *Hopewell* v. *Ackland*, that a fee will not pass by the word hereditament." An advowson, as an incorporeal hereditament, will no more pass the fee by a devise of it as advowson in a will, than by a grant of it in a deed. "Advowson" or "perpetual advowson," apply, therefore, only as being descriptive of the thing devised, and not as denoting the quantity of interest which the devisee is to take. And whether those words be in a deed or in a will, there is no difference

(*a*) 1 Salk. 239.——(*b*) Moseley, 242.

whatever, the terms themselves alone being considered. I have only to add, that that which struck my Brother *Park* as the strongest point in this case, has not the same weight with myself; and without going into detail as to this part of the subject, after what he has already said, but referring to the observations of my Brothers *Burrough* and *Richardson*, who have preceded me, I will merely say, that it only involves, as appears to me, matter of conjecture more or less doubtful; and at all events does not denote that clear and manifest intent, which on the known and admitted principles of law, can alone give to words in a will a different construction from what they would receive in a deed. The rule, therefore, I think, must prevail, independently of other grounds, *viz.* that the construction of wills must be made according to estates at common law by deed, unless there be something in the intent of the testator appearing to the contrary on the face of the will. Into this, therefore, the present case seems to me to resolve itself; and even if I could admit it to be in a degree probable, that the testator intended to give an estate in fee, I must have recourse to the general principle so often applied to cases of this description, "*Voluit sed non dixit*;" and the testator not having spoken for himself, the law must speak for him; and I, on any conjecture of my own, cannot do so; I beg, however, to be considered as giving no conjecture as to probability, either one way or the other; but in the absence of clear intent, as deciding the case upon the clear principles of law, by which I think it ought to be governed; I am therefore of opinion, that an estate for life only in the advowson in question, passed to *Richard* the devisee, under the will of his father.

Judgment for the plaintiffs.

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Wednesday, July 11.

COATES and Others *v.* PERRY, Esq. and Others..

By a deed of assignment, five persons conveyed all their crops, goods, and effects to trustees, in trust to sell, and with the proceeds to be produced by such sale, to discharge first, debts due to the trustees, with interest from the date of the deed; then debts due to other creditors, with a resulting trust as to the residue to the parties conveying:—Held, that such deed did not require an *ad valorem* stamp, as upon a "conveyance" or "mortgage" under the statute 55 *Geo.* 3. c 184, sched. part 1, as the former clause operates only as to actual sales between vendor and vendee; and that it fell within the exception in the latter, *viz.* "where such conveyance shall be made for the benefit of creditors generally," and therefore that a common deed stamp was sufficient.

THIS was an action of trover, brought by the plaintiffs against the defendant *Perry*, as sheriff of *Herefordshire*, and two of his officers, for taking a horse in execution, which the plaintiffs contended had been conveyed to them as trustees, together with other property, by a deed of assignment, in trust to sell and discharge debts due to them and other creditors, from certain persons, by the name of *Preece*.

At the trial of the cause before Mr. Justice *Park*, at the last Assizes at *Hereford*, the plaintiffs, in order to prove possession of the horse under the deed, produced it in evidence, when it appeared to be impressed with a common deed stamp of 1*l.* 15*s.*; and it was objected for the defendants, that it required an *ad valorem* stamp, and fell within the meaning of the clause, tit. "Conveyance," 55 *Geo.* 3. (*a*); or that at all events it came within the meaning of the clause, tit. "Mortgage," in the schedule of that act (*b*).

(*a*) Chap. 184. sched. part I. page 1563, Conveyance;—whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim, in, to, out of, or upon any lands, tenements, rents, annuities, or other property; that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction.

(*b*) Id. 1587, 8. Mortgage;—conditional surrender, by way of mortgage, further charge, wadset, and heritable bond; disposition, assignation, or tack in security; or eik to a reversion; of or affecting any lands, estate, or property, real or personal, heritable or moveable whatsoever: Also any conveyance of any lands, estate, or property whatsoever, in trust, to be sold, or otherwise converted into money, which shall be intended only as a security, and shall be redeemable before the sale or other disposal thereof, either by express stipulation or otherwise; *except where such conveyance shall be made for the benefit of creditors generally*, or for the benefit of creditors specified, who shall accept the provision made for payment of their debts in full satisfaction thereof, or who shall exceed five in number.

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The following is an abstract of the deed upon which the question arose:—By indenture, dated the 24th *March*, 1820, made between *Ann Preece*, widow, and four of her sons, of the one part;—*Mark Poyntz Matthews*, *Benjamin Coates*, and *Thomas White* (being respectively creditors, and also trustees named and appointed on behalf of themselves and other the creditors of the said *Ann Preece* and her sons, for the purposes thereinafter expressed), of the other part; after reciting, that the said *Ann Preece* and her sons were justly indebted to the said *Mark Poyntz Matthews* in the sum of 1300*l.*, to *Coates* in 820*l.* 11*s.* 8*d.*, and to *White* in 100*l.*, making together the sum of 2220*l.* 11*s.* 8*d.*; and were also indebted to various other persons in several sums of money which they were then unable to discharge, had agreed to assign all their personal estate and effects to the said *Matthews*, *Coates*, and *White*, in trust to pay and satisfy the same, in the manner thereinafter expressed:—it was witnessed by the said indenture, that in pursuance of the said agreement, and in consideration of the sum of 10*s.* a-piece to the said *Ann Preece* and her sons, paid by *Matthews*, *Coates*, and *White*, she and her sons, and each of them, granted, bargained, sold, assigned, transferred, and set over unto *Matthews*, *Coates*, and *White*, their executors, administrators, and assigns, "All that the live stock and the crops of corn, grass, hay, straw, hops, and fruit, then growing or to grow; implements of husbandry, household goods and furniture, plate, linen, and china, book and other debts, bonds, notes, bills, and securities, and all and singular other the personal estate, property and effects, of what nature or kind soever or wheresoever, of or belonging, or due or owing to them the said *Ann Preece* and her sons, or any or either of them, together with all powers, remedies and privileges of her and her sons, or any or either of them, both at law and in equity, for taking, receiving, recovering, and enforcing payment of the same, and every or any of them, or any part thereof";—to have, hold, receive, perceive, and

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take, all and singular the said stock, crops, implements of husbandry, household goods, debts, securities, and other the personal estate and effects thereby assigned, unto them the said *Matthews*, *Coates*, and *White*, their executors, administrators, and assigns, wholly and absolutely, as and for their own proper goods, chattels, and effects: but nevertheless, upon the trusts, and to and for the intents and purposes, and under and subject to the powers, provisoes, declarations, and agreements thereinafter declared or expressed concerning the same. Then followed a power of attorney, enabling *Matthews*, *Coates*, and *White* to recover, receive, and get in the said debts, securities, monies, and premises assigned by the deed: and it was thereby further declared, that they should stand possessed of the said personal estate and effects, debts, monies, and other the premises hereinbefore assigned, upon trust, that they the said *Matthews*, *Coates*, and *White*, and the survivors and survivor of them, and the executors, and administrators of such survivor, or any attorney by them or him lawfully authorized in that behalf, at or upon their or his own proper discretion and authority, without any further consent, authority, or concurrence of them the said *Ann Preece* and her sons, or any or either of them, or their or his executors or administrators, immediately upon the execution of the indenture, or at any time or times thereafter, when and as they or he should think fit, sell and dispose of, either by private contract or public auction, together or in separate parcels, and at one or different times, as they should think best, all and singular the said stock, crops, goods, and effects, and get in and receive the said debts and monies, and other the personal estate and effects thereinbefore assigned or mentioned, or intended so to be; and that the said *Matthews*, *Coates*, and *White*, and the survivors or survivor of them, their executor and administrators, and other the trustee or trustees for the time being of the said trust property, should stand possessed of all the monies to be produced by such sale or sa

of the said stock, crops, and goods, and also in all debts and other monies which should arise from the said personal estate and effects, upon trust, that they the said *Matthews*, *Coates*, and *White* did and should, in the first place, retain and reimburse themselves respectively, all costs and expences incurred in preparing and executing the indenture, or in relation thereto, and then in payment and satisfaction of all legal rents, taxes, and duties, and salaries and wages to clerks, servants, and agents employed about the concerns of the said *Ann Preece* and her sons, and also of all expences incident to the sale or other disposition of the said personal estate and effects, and in collecting the debts and monies of the said *Ann Preece* and her sons; and after payment of the same costs, charges, disbursements, and expences, then and in the next place upon trust, that *Matthews*, *Coates*, and *White* did and should pay and satisfy the said sum of 2220*l.* 11*s.* 8*d.* so mentioned to be due and owing to them, with interest for the same, after the rate of five *per cent.* per annum, from the day of the date of the indenture until the liquidation thereof; and should pay and apply all the residue of the said monies in payment and satisfaction of the several other debts and demands, owing by the said *Ann Preece* or her sons, to such of her, his, or their respective creditors, or their respective executors, administrators, partners, or assigns, rateably and in proportion to the amount of the debts owing to them respectively, without any priority or preference of any one or more of them to the others or other of them; and after full payment and satisfaction of all and every the debts and demands, and all costs and expences aforesaid, then in trust, that they should pay the residue or surplus of the monies to arise therefrom to the said *Ann Preece* and her sons, to and for her, his and their own use and benefit; provided always, that it should be lawful for the trustees for the time being, out of the first or other monies which should come to their hands by virtue of the indenture, to satisfy any executions or extents which might have been awarded against the persons

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or property of the said *Ann Preece* and her sons, or either of them, and the costs relating thereto. Then followed covenants on the part of *Ann Preece* and her sons, to execute and deliver proper deeds of conveyance, or other good and sufficient assurances in the law, to the trustees for the time being, as they should be advised, for the further and better assigning, conveying, and assuring the personal estate and effects thereinbefore assigned, as also all other the personal and real estate and hereditaments, and other the premises of the said *Ann Preece* and her sons; and they also covenanted with *Matthews*, *Coates*, and *White*, that they would manage, work, and cultivate the lands, grounds, and premises in their possession or occupation in the best manner; and sow and plant the same with proper and sufficient corn seeds, or grain, which might be deemed most advisable for the benefit of the creditors of the said *Ann Preece* and her sons, and to, for, and upon the trusts expressed in the deed.

The learned Judge was of opinion, that the deed was properly stamped, as the *ad valorem* duty required by the statute 55 *Geo.* 3. *c.* 184, Sched. Part 1, to be paid "on conveyances," applied only to sales between vendors and purchasers, and not to trustees who were authorized to dispose of property for the benefit of other creditors; and if it fell within the description of title "Mortgage" (*a*), in the schedule of that statute, it would come within the exception contained therein, as being a conveyance made for the benefit of creditors generally; and the Jury accordingly found a verdict for the plaintiffs, damages 60*l*., being the value of the horse in question.

Mr. Serjt. *Lens*, in the last Term, obtained a rule *nisi* that this verdict might be set aside, and a nonsuit entered and insisted, that the deed required an *ad valorem* stamp under the above statute, on the objections raised at the trial the whole of the property of the *Preeces* being assigned the plaintiffs for the purpose of sale, and to satisfy t

(*a*) Pages 1587, 8.

debts exclusively in the first instance; it at all events fell within tit. "Mortgage," in the schedule to that statute.

Mr. Serjt. *Vaughan* on a subsequent day shewed cause. There is no ground whatever for this application, as the deed in question does not come within the meaning of title "Conveyance," in the schedule to the act; as it was merely an assignment of personal property, not to a purchaser as on an actual sale, but to trustees named as such in the deed, upon certain trusts and particular purposes therein also mentioned. The statute specifically states a conveyance *upon the sale* of lands or other property to a purchaser, without taking any notice of trusts to be raised thereby; and here, there was no contract between the parties to the deed for the sale or purchase of property, which there must have been, to bring it under the scope of that clause in the schedule. There is no consideration mentioned in the witnessing clause of the deed, so as to guide the *ad valorem* duty; it was therefore properly impressed with a stamp of 1*l.* 15*s.* as directed by the statute under title "Conveyance of any kind whatever, not otherwise charged in that schedule, nor expressly exempted from all stamp duty (*a*)," or under title "Deed" contained in that schedule (*b*). The *ad valorem* duty can only attach on a sale by trustees for the purpose of executing their trust, and not on the conveyance of property by the original debtor to them. So, an *ad valorem* stamp, as on a mortgage, is equally unnecessary, as there was no stipulation, express or otherwise, for the redemption of the property that passed under the deed, before sale or other disposal thereof, which must have been the case to bring it within the meaning of that clause; nor was it intended as a security only; on the contrary, the property assigned under the deed was to be converted into money, and to be applied in liquidation of the creditors' demands, as far as the same would extend; neither was it in the nature

(*a*) Page 1574.——(*b*) Id. 1578.

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of a conditional surrender by way of mortgage, but as an absolute power in the trustees to sell; and although the property was conveyed for the payment of the respective sums due to them in the first instance, yet all the creditors were ultimately to have obtained payment, so that at all events, the deed fell within the latter part of the exception contained at the end of the second branch of the clause relative to mortgages, *viz.* "the conveyance being made for the benefit of creditors generally, or for the *benefit of creditors specified*, who shall accept the provision made for payment of their debts in full satisfaction thereof" (*a*).

Mr. Serjt. *Lens*, in support of the rule.—The deed in question substantially amounts to a conveyance for the purpose of sale between the parties, and therefore required an *ad valorem* stamp. The *Preeces* assigned all their property to the three trustees in the first instance, for the express purpose of satisfying their debts. The property, when disposed of, might not have produced a sufficient sum to have paid them, and the deed therefore falls within the general terms of the statute, which extends to every species of sale, and is not confined to cases as between vendor and vendee alone; for any thing that is tantamount to a sale or transfer of property, requires the *ad valorem* duty, as imposed thereby. The estate was at all events substituted for the debt; and if the *Preeces* should pay such debt by any other means, the deed would come within the clause relating to mortgages. It is not necessarily one entire transfer or sale, but is redeemable by the nature of the instrument, although it does not contain any express stipulation to that effect; and if the debtors had satisfied the sums owing to the trustees by any other mode than the disposal of the estate, the latter could not retain or sell the property assigned to them. It is not a conveyance for the benefit of creditors *generally*, but for the benefit of the trustees; for

(*a*) Page 1588.

the former would remain unpaid, if the property, on being sold, did not produce a sufficient sum to satisfy the latter. The deed, therefore, does not fall within the exception under the head "Mortgage," which must be construed literally and strictly. The conveyance is in the nature of a mixed consideration, for satisfying three particular creditors only in the first place; and not for the benefit of specified creditors who shall accept the provision made for payment of their debts in full satisfaction thereof, or who shall exceed five in number. [Mr. Justice *Richardson*.—There is nothing on the face of the deed to shew that any specified creditors accepted the provision made therein in satisfaction of their debts, nor does it contain any stipulation to prevent their suing for the residue, in case the estate, when disposed of, should not produce a sufficient sum to satisfy the amount of their debts.] It was not made for the benefit of creditors generally, nor can it be so considered. Neither do the specified creditors accept the provision made therein in full satisfaction of their debts: neither do they exceed five in number. The case therefore falls within none of those exceptions, and the property conveyed is in the nature of an equitable redemption for the payment of a certain specified sum, actually payable to the trustees, and which they were to receive in the first instance under the deed from the proceeds of the sale of the property, with interest due thereon. On these grounds, therefore, the plaintiffs are not entitled to recover.

Cur. adv. vult.

Mr. Justice PARK on this day delivered the judgment of the Court as follows:—

This case was tried before me at the last Assizes at *Hereford*, when a verdict was found for the plaintiffs, which met with my full approbation; and the only material question was, whether the deed of assignment under which the plaintiffs claimed the horse in question was duly stamped or not.

1821.

COATES v. PERRY.

A motion was afterwards made in this Court, that that verdict might be set aside, and a nonsuit entered; and as it was argued in the absence of my Lord Chief Justice; my Brothers *Burrough*, *Richardson*, and myself, postponed giving our opinions at the conclusion of the argument;—not from any doubts we then entertained, but in consequence of a similar question in the same cause depending in the Court of King's Bench, with the exception of the reversing the situation of the parties of the plaintiffs and defendants; and we wished to come to the same conclusion which that Court might have done. We have not heard whether that cause has been decided or not, but think, that on this ground alone we ought not to delay our judgment. The question depends on the statute 55 *Geo.* 3. *c.* 184, Sched. Part 1; and it has been admitted, that if the instrument in question can be considered as in the nature of a common deed, it has been duly stamped as such, either under the descriptions in the schedule of that statute, of a "Conveyance" or "Deed of any kind whatever, not otherwise charged in that schedule, nor expressly exempted from all stamp duty" (*a*). It has been insisted, however, that it required an *ad valorem* stamp, as falling under the word "Conveyance," in the schedule of that statute (*b*), "whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, *upon the sale* of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim, in, to, out of, or upon any lands, tenements, rents, annuities, or other property; that is to say, for and in respect of *the principal or only deed, instrument, or writing*, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to, *or vested in, the purchaser or purchasers*;" but we are of opinion, that the deed does not fall under this description in the schedule, as the words *upon the sale of*

(*a*) Sched. Part 1. tit. "Conveyance," page 1574. "Deed," 1578.—
(*b*) Page 1568.

lands, &c. or vested in the purchaser or purchasers, shew, that this clause was intended to operate only on actual sales, as between vendor and vendee. Here, the deed only appointed trustees to sell and dispose of the estate, and distribute the produce arising from such sale in the manner therein mentioned. The statute has only required the *ad valorem* duty to be paid in cases under the word "Conveyance," where the purchase or consideration money therein or thereupon expressed shall amount to certain sums therein specified, and according to the amount of which such duty is regulated. That, therefore, evidently shews, that the legislature intended that such duty should be payable on an immediate money consideration expressed on the face of the instrument; and here it appears that the consideration money, as mentioned in the deed, amounted to ten shillings only. Still, however, it has been insisted, that if the *ad valorem* duty be not payable under the word "Conveyance," yet, that the deed would fall under that of "Mortgage," in the same schedule, and liable to such duty under these words, *viz.* (*a*) "Any conveyance of any lands, estate, or property whatsoever, in trust, to be sold or otherwise converted into money, which shall be intended only as a security, and shall be redeemable before the sale or other disposal thereof, either by express stipulation or otherwise." If that clause had not proceeded further, the deed would have fallen within it; but it states, *except where such conveyance shall be made for the benefit of creditors generally*. Now, if the deed was so made, it falls within that exception, and the stamp impressed upon it was sufficient. It is only necessary to look at the deed, to ascertain the purposes for which it was intended; by it, all the property of the debtors was conveyed to trustees, in trust for the purpose of sale, and that they should stand possessed of the monies produced by such *sale*, and also all other monies which should arise from their personal estate, in the first place, to reimburse themselves all expences incurred in

(*a*) 55 Geo. 3. c. 184 Sched. Part 1, Page 1588.

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preparing and executing the deed; then, in payment of rents, taxes and other debts, as well as the sum due to the trustees, with interest; and that they should pay and apply the residue in payment and satisfaction of the several other debts owing by the *Preeces* to their creditors, rateably and in proportion, to the amount of the debts owing to them respectively, without any preference; and after such payment, to deliver the surplus to the *Preeces*, for their own use and benefit. It is true the primary object of the deed was the payment of the gross sum due to the trustees, but after they had been satisfied, they were to hold the remainder in trust, to pay all the other creditors, with a resulting trust to the original debtors. The payment of the creditors generally, therefore, was not only in contemplation at the time, but appears to be the object of the deed; and we therefore think that this case falls within the exception of the statute, under the head "Mortgage." If we were to decide the contrary, it would be a harsh construction of the act, as the trustees would have a double *ad valorem* duty to pay before any benefit could be derived by the creditors from the property, in all cases where deeds of this description are deemed advisable, *viz.* the one on the immediate conveyance of the property from the debtor, and the other when the sale took place for the purpose of executing the trust, when there is no doubt that the *ad valorem* duty is payable. I need only further observe, that every deed of this description has its own peculiar properties; and here, although the principal object of the *Preeces* was to pay and satisfy the debts due to the trustees in the first instance, yet, their general object was the payment of all their creditors generally, and we are therefore of opinion that this rule must be

Discharged.

1821.

ANDREWS *v.* ELLISON and Others.

Wednesday, July 11.

THIS was an action of covenant on a policy of assurance executed by the defendants under seal, to indemnify the plaintiff against a loss by fire. The declaration stated, that on the 9th *December*, 1819, the defendants, as three of the directors of the *National Union Fire Association*, made and sealed a certain deed-poll, commonly called a policy of assurance, which the plaintiff brought into Court, whereby, after reciting that the defendants, as such directors, had admitted the plaintiff to be a member, upon the terms, covenants, and conditions prescribed by the deed of settlement of the said association; and that the plaintiff had consented to become a member accordingly, and had subscribed the sum of six shillings, being the consideration-money for one year's insurance from the 25th *December*, 1819, and that so long as he should continue to pay the same sum annually on that day, he should be entitled to a remuneration out of the society's funds in case of loss by fire, to all or any of the property thereinafter mentioned, not exceeding for each item respectively the sum set against the same, that is to say, 200*l.* on his household furniture, &c. in his then brick dwelling-house:—it was declared, that in case of loss by fire happening to any of the above-mentioned property while such subscription should be regularly deposited, the society was to pay, according to the deed of settlement, to the plaintiff, all such loss or damage, not exceeding the sum set against each article respectively, as he might sustain thereto by fire; the policy, nor the plaintiff, or the holder of it, should, as members of the society, be subject or liable to any demand for loss, except under the articles establishing the society, and as was provided by the same. The plaintiff having sustained a loss by fire, brought an action of covenant against the directors who signed the policy, and averred in his declaration, that the funds of the association were sufficient to satisfy the amount of such loss; and the Jury found a verdict for him:—Held, that such declaration was sufficient, and that the defendants were liable by the terms of the policy; and the Court, therefore, refused to arrest the judgment.

By a policy under seal, three of the directors of a fire association admitted the plaintiff to be a member of that society upon the terms and conditions prescribed by the deed of settlement of the association, and he subscribed a certain sum as the consideration-money for one year's insurance, and it was declared, that he should be entitled to a remuneration out of the society's funds, in case of loss by fire happening to any property therein specified, not exceeding the sums set against each article respectively; and it was further stipulated, that neither of the directors who signed

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and it was further stipulated and thereby declared, that neither of them the said directors who subscribed the said deed-poll or policy of assurance, nor the plaintiff as the holder of the policy, should as members of the said society, be subject or liable to any demand for loss or losses, except under the articles establishing the said society, and as was provided by the same.—The declaration then set out certain articles and conditions referred to in the policy, and subject to which it was effected; by the eighth of which, it was provided, that whenever losses should happen, the parties should give immediate notice thereof to the secretary, or to the nearest agent, that a view might be taken, and the damage estimated; and also deliver under their hands, the particulars and amount of their claim on the office; and make out the same by the oaths or affirmations of themselves, or by their domestics or servants, books, or vouchers, and procure certificates of the ministers, churchwardens, neighbours, or inhabitants not interested in such loss, if they were required by the directors so to do; the loss or damage sustained, to be made good within ninety days after the same happened, (or as soon as the amount could be properly ascertained), either by payment of the sum insured, or by repairing or rebuilding the premises destroyed or damaged, as far as the sum insured would allow, at the option of the directors. By the ninth article it was stipulated, that the office would not make good any losses by fire occasioned by foreign enemies, civil commotions, or by any military or usurped power, or in consequence of explosion of gun-powder or steam.—The plaintiff then averred, that although he had well and truly observed, performed, and fulfilled all things in the policy contained, which on his part were to be observed, performed, and fulfilled, and that although the stock and funds of the association always, from the time of the making of the policy hitherto, have been and yet are sufficient to pay to the plaintiff the amount of the damage and loss sus-

tained by him by fire; and that although the time for payment thereof had long since elapsed, yet that the loss or damage so sustained by the plaintiff, has not, nor has any part of it been made good or paid to him out of the stock and funds of the association, or by the defendants, or any of them, or by any other directors of the association, or otherwise howsoever; but that the same still remains not made good, but is unpaid and unsatisfied to the plaintiff, contrary to the form and effect of the policy, and of the covenant of the defendants therein in that behalf made. The defendants pleaded several special pleas, stating, in substance, that there was no furniture in the plaintiff's house at the time of the loss; that no part of it was destroyed by fire; that the plaintiff had kept hay and straw on the premises without the knowledge of the defendants, whereby the risk was increased; that the house was not accurately described in the policy as brick, as it was composed of brick and wood, and should have been so stated. On all these pleas issues were joined.

The cause came on for trial before Lord Chief Justice *Dallas*, at the Sittings after the last *Hilary* Term, when the Jury found a general verdict for the plaintiff, on all those issues, as the loss sustained by him was fully made out, and as he had not been guilty of any breach in either of the conditions or stipulations in the policy, to prevent him from recovering the amount of the loss so sustained.

Mr. Serjt. *Pell*, in the course of the last Term, obtained a rule *nisi* that the judgment might be arrested, on the ground that there was nothing on the face of the policy, or in the declaration, to import any covenant or agreement in law to support the action, or render the defendants liable to pay the loss in question. He submitted, that the plaintiff's only remedy was in equity, and relied on the case of *Al-*

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ANDREWS v. ELLISON.

K. B. *Hilary Term*, 1820.

F., *W.*, and *M.*, being trustees and directors of a fire insurance company, executed a policy to indemnify *A.* and others from loss by fire, whereby they ordered, directed and appointed the directors for the time being to pay the loss which *A.* and others should sustain in the event of a fire happening; and the policy, among other clauses, went on to recite certain provisions containing the words, "conditions, and agreements," and a loss having happened:—Held, that the policy was not an instrument or agreement upon which covenant would lie, and consequently, that neither the executing parties, nor the directors for the time being, were liable at law.

chorne v. *Saville* (*a*), as bearing a near resemblance to the present, and in which the Court of King's Bench had decided, that an action of covenant could not be maintained, although the words in the proviso there, were "declared and

(*a*) ALCHORNE and Others *v.* SAVILLE and Others.

THIS was a case sent by the direction of the Vice-Chancellor for the opinion of the Judges of the Court of King's Bench, and the question was, whether an action would lie under the following circumstances:—On the 20th *May*, 1811, the plaintiffs insured a certain house and premises, in which they were interested, in the *Hand and Hand Fire Insurance Office*. The policy was made and duly executed by *J. F.*, *N. W.*, and *J. M.*, as three of the trustees and directors of the office, whereby, in consideration of the sum of 4*l.* 10*s.* the premises, valued at 1800*l.* were insured for the term of one year from the date thereof. The policy, after reciting that the plaintiffs had paid into the treasury of the amicable contributionship or society, commonly called the *Hand in Hand* contributionship or society for the insuring of houses and goods from loss or damage by fire, the sum above-mentioned, for the purpose also above-mentioned, proceeded to declare as follows:—"Now, we the trustees and directors of the said society, whose names are hereunto subscribed, do order, direct, and appoint the directors for the time being of the said society to raise and pay, by and out of the monies, securities and effects of the said contributionship, pursuant and according to certain deeds and settlements, &c." The instrument, after declaring that the order thus mentioned should comprehend either a total or partial loss by fire, went on to proceed as follows:—"Provided, and it is hereby declared and agreed, that when any assignment shall be made of this policy, such assignment shall be entered in the office books within ninety days from the date thereof, &c. And also, that if at the expiration of one year from the date thereof, the said plaintiff shall again pay the sum of 4*l.* 10*s.* then all the conditions and agreements of this policy shall remain in full force for the further term of one year, and so shall be continued from year to year as often as the said sum of 4*l.* 10*s.* shall be paid by the plaintiffs, and the directors for the time being shall agree thereto by accepting or receiving the same. In witness, &c." The policy was signed by *J. F.*, *N. W.*, and *J. M.* three of the trustees and directors of the office, and sealed and delivered, being first duly stamped, and attested in the presence of two witnesses. The plaintiffs having sustained a loss by fire, and the defendants having refused to pay within the time prescribed by the policy, a bill was filed in Chancery against the latter, as acting trustees and directors of the office, praying that the Vice-Chancellor would decree the payment of the loss which the plaintiffs had sustained; and the above case being sent for the opinion of the Court of King's Bench, whether an action at law could be maintained upon the policy against the defendants,

agreed," whilst here, the words "stipulated and declared" only were adopted.

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Mr. *Puller*, for the plaintiffs, contended, that the proper remedy was by action of covenant against the defendants on the policy, they having disobeyed the order therein contained. That instrument might have the legal effect and operation of an agreement. Wherever the word "agreement" is found in an instrument executed by a party, the effect of it is, that he *covenants* on his part, that the thing stipulated shall be done, and consequently the law will give an action of covenant to the party aggrieved. In support of that proposition he cited the cases of *Hollis* v. *Carr* (*a*), and *Brice* v. *Carre* (*b*). To bring the present case within that rule, it is only necessary to refer to the words of the concluding clause of the policy, where it is declared, "that if at the expiration of one year from the date thereof, the plaintiff shall again pay the sum of 4*l*. 10*s*. then all the *conditions and agreements* of the policy shall remain in full force, &c. and the directors for the time being shall agree thereto, &c." Undoubtedly, if these words were not to be found in the policy, it would be difficult to contend, that an action of covenant would lie, but being there, they must be taken to give the policy all the effects of an agreement, and all the legal incidents of an agreement must consequently follow.

Mr. *Chitty*, *contrà*, was stopped by the Court.

Lord Chief Justice ABBOTT.—I can find nothing in this policy by which the defendants covenanted to pay the loss which the plaintiffs have sustained. The deed only imports, that the trustees and directors for the time being, who execute it, do thereby order, direct, and appoint the trustees and directors for the time being to pay the loss in case it should happen, out of the funds belonging to the society. It does not appear to me, that the latter words in the policy can have the effect of making that an agreement, which, upon the face of it, appears only to be an order for the payment of money. It never could be intended, that this instrument, so prepared, should have the effect of making the trustees and directors for the time being, personally liable. Nothing could be more difficult than for a company of this description to find acting trustees who would personally pay all the policies which the company might think proper to execute. It therefore seems to me, that the only remedy the plaintiffs have is in equity, and they cannot turn round and treat this as a covenant at law. I admit, that where a party executes an instrument and thereby says, "I agree to do so and so," he would be liable to an action of covenant; but how could a declaration in covenant be framed in this case, either against the defendants, or the parties who have executed the policy? As against the latter, no such declaration could be drawn, because the policy imports nothing but an order upon other persons to pay the loss in case it should happen; and as against the former, supposing the instrument to have the effect of an agreement, the action would not lie, because it does not appear that

(*a*) 2 Mod. 86. (*b*) 1 Lev. 47.

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Mr. Serjt. *Vaughan* and Mr. Serjt. *Hullock* now shewed cause, and contended, that no precise or technical words were necessary to create or constitute a covenant; for any form of words or mode of expression in a deed, purporting to be an agreement, will amount to a covenant, if it be the intention of the parties that they should do so. In *Comyn's Digest* (*a*), it is laid down, that "if by articles of agreement it is said, that it is intended a fine shall be levied; this amounts to a covenant to levy it." There is nothing contained in the policy to limit the responsibility of the defendants to the funds of the society; even if there had been, it was expressly averred in the declaration that such funds were sufficient to satisfy the plaintiff from the time of making the policy to the commencement of his action. The defendants might have demurred or craved oyer;—instead of which, they have pleaded several pleas, imputing fraud to the plaintiff, which were entirely negatived at the trial. The case of *Alchorne* v. *Saville* is altogether distinguishable from the present, for there the defendants were no parties to the policy, and that instrument imported nothing but an order upon other persons to pay the amount of a loss, in case it should happen. The defendants, therefore, could not be declared against thereon, as it was not their deed, and the plaintiffs

they have executed it. This policy imports nothing but an order, and not an agreement. I am therefore of opinion, that an action of covenant cannot be maintained.

Mr. Justice BAYLEY.—I am of the same opinion. If this could be considered as an agreement, and was declared upon as against these defendants, the plaintiff must be nonsuited on the plea of *non est factum*, because it is not the deed of the defendants. But I think that in any way in which we can consider the plain words of this instrument, it is clearly not an agreement.

Mr. Justice HOLROYD and Mr. Justice BEST were of the same opinion.

The Judges accordingly certified their opinion to the Vice-Chancellor, that no action of covenant would lie upon the policy.

(*a*) Tit. Covenant (A. 2.)

must have been nonsuited on the plea of *non est factum*. Here, the stipulation in the policy must at all events be considered as a covenant by the defendants to pay the loss which the plaintiff has sustained, provided the funds of the association were adequate thereto; and the plaintiff has expressly alleged, that they were sufficient for that purpose; and the breach is framed accordingly. The defendants covenanted not only for themselves, but for the whole of the members of the society, and if they had funds the breach is well assigned. Even if it were otherwise, it cannot be objected to after verdict. Any words contained in a deed demonstrative of an agreement between the parties, are sufficient to enable one to sue the other for the breach of any condition contained therein; for in *Bacon's Abridgment* (*a*) it is stated, that "the law does not seem to have appropriated any set form of words, which are absolutely necessary to be made use of in creating a covenant; and therefore it seems that any words will be effectual for that purpose, which shew the parties concurrence to the performance of a future act."

Mr. Serjt. *Pell* and Mr. Serjt. *Lawes* in support of the rule, relied principally on *Alchorne* v. *Saville*, and submitted, that the question in this case was purely of a legal nature, and arose from the words of the policy alone; from which the Court could not infer that there was any covenant, or stipulation, either express or implied, or agreement between the parties to pay the loss which the plaintiff had sustained. At all events, there was no contract or agreement of a personal nature as between him and the defendants. It was a mere declaration by them as directors or members of the association, how and on what terms premises should be insured, and the funds of the society applied. They only assented to the distribution of such funds, as they expressly declared, that they would not be subject or liable to any

(*a*) Tit. Covenant (A.)

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demand for loss, except under the articles establishing the society. They can therefore only be liable as co-proprietors, and their personal liability is entirely out of the question, for *Expressio unius est exclusio alterius.* Upon the whole, therefore, no personal liability or individual responsibility attaches to them; but they must be considered only as partners participating in the general profits and losses of trade.

Lord Chief Justice DALLAS.—It has been admitted in the course of the argument, that no precise or technical words are necessary to create a covenant, but that whether it be so or not, depends on the intention of the parties. This, therefore, narrows the consideration of the present question to the words contained in the policy on which this action is brought; and although there are no precise words in that instrument, still the defendants have stipulated and declared, that neither of them, as directors of the association, should, as members of the society, be subject or liable to any demand for loss or losses, except under the articles establishing the society, and as is provided by the same. In the reasonable construction of this stipulation, it amounts to an express agreement; and the instrument may be considered as a covenant to entitle the insurer in case of loss by fire, to receive a remuneration out of the funds of the society to the extent of such funds as the defendants have expressly declared, that the society would be responsible, but they have limited such responsibility to the sufficiency of their funds. The plain and obvious meaning therefore appears to me to be, that the association are liable to the extent of their funds, and consequently that the defendants, as three of the directors, have entered into an express agreement to be responsible to the plaintiff, as far as the funds of the society would allow. This case is altogether distinguishable from that of *Alchorne* v. *Saville,* as here the plaintiffs have executed the deed, but there they were not parties to it; they only ordered the directors of the society for the time being, to do particular

things, *viz.* to raise and pay out of the monies and securities of the contributionship according to certain deeds and settlements; and the Court of King's Bench decided, that they were not personally liable, as it was not their deed, and as they merely appointed other persons to pay a loss in case it should happen, out of the funds belonging to the society. Here, however, the plaintiffs covenanted to pay, if the funds of the society should be adequate; that, therefore, puts an end to the question. Besides, the breach assigned by the plaintiff in his declaration is sufficient, for he states that although the funds of the association were adequate to pay, yet that the defendants refused to do so. As this case, therefore, is so mainly distinguishable from that of *Alchorne* v. *Saville*, I have no doubt but that the plaintiff is entitled to recover, and more particularly so, as the policy in question was signed by the defendants, who agreed or covenanted to be themselves personally liable as far as the funds of the society would extend; and the Court will not arrest a judgment after trial, unless it be obvious and clear that there is some material ground on which they are enabled to do so. All the pleas on this record have been negatived by the finding of the Jury. I therefore think there is no substantial ground whatever for arresting this judgment.

Mr. Justice PARK.—I am of the same opinion. This case appears to me to be quite different from that of *Alchorne* v. *Saville*, which was a special case sent by the Vice Chancellor for the opinion of the Court of King's Bench, and in which it was expressly stated, that the defendants merely ordered the directors for the time being to pay; and they did not sign the policy. Here, however, the defendants' seals and signatures are attached to the instrument, in which it is recited, that they were three of the directors of the association, and agreed that as long as the plaintiff should continue to pay an annual sum for insurance of his premises from fire from year to year,

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he should be entitled to a remuneration out of the society's funds. That was an express undertaking that he should be so remunerated; besides, they admitted the plaintiff a member on the terms, covenants, and conditions prescribed by the deed of settlement of the association; and it appears by the eighth clause of the articles which are set out in the declaration, that the loss sustained was to be made good within ninety days after the same happened, either by repaying the sum insured, or by repairing or rebuilding the premises destroyed. The defendants signed the policy, which referred to that article or condition. It is true they are not themselves personally liable, but the plaintiff was clearly entitled to recover from the funds of the society, if they were sufficient to defray the amount of his loss. The plaintiff has averred that they were, and that therefore is all that he was required to do; and I fully concur with my Lord Chief Justice, that the Court will not arrest a judgment, unless it be perfectly clear that the plaintiff is not entitled to retain it, for it is a general rule, that nothing is to be presumed after verdict but what is expressly stated in the declaration, or necessarily implied from the facts which are stated.

Mr. Justice BURROUGH.—I entertain no doubt whatever on this question. Even if I did, I am quite satisfied that this judgment ought not to be arrested. The directors of the society held themselves out to the world as being responsible persons. If they were not so, no person would insure property with them. Besides, it would be a gross fraud on the public. The defendants admitted the plaintiff to insure, and agreed by such admission, that he should be entitled to a remuneration out of the society's funds. As no precise words are necessary to constitute a covenant, the words *shall be entitled* are sufficient to imply that the plaintiff should be remunerated out of the funds of the society, provided they were sufficient for that purpose; he therefore had

a right to look to the defendants in the first instance. Unless they were liable, no society of this description would be obliged to pay in case of loss. Even if the words contained in the policy were more equivocal than they are, still as the defendants have executed the instrument, I think they are liable, and that it was unnecessary for the plaintiff to have set out more than he has done in his declaration.

Mr. Justice RICHARDSON.—It has often been determined that Courts will work great injustice if they allow judgments to be arrested, unless it be manifest that they have the clearest grounds for so doing; for it is now settled, that a judgment cannot be arrested for extrinsic or foreign matter, not appearing on the face of the record; but Courts are to give judgment upon the record itself, that their successors may know the ground of such judgment. This was an action of covenant brought against the defendants as three of the directors of the *National Union Fire Association*, and the terms of the policy have been set out by the plaintiff in his declaration, by which it appears, that in case of loss by fire, he was to be entitled to receive a remuneration for such loss out of the funds of the society; and he has averred, that they have sufficient funds to cover the damage which he has sustained. The defendants should either have demurred, or pleaded that the funds were insufficient; but they have put in a number of other pleas on the record, imputing fraud to the plaintiff, which the Jury negatived, and set him right by their verdict; and the defendants now seek to turn him round on an objection to the declaration, but I think it is not well founded, or at all events, it is insufficient for the purpose of arresting the judgment. It appears on the face of the policy, that the defendants were three of the directors; that as such, they admitted the plaintiff to be a member; and it then states, that he should be entitled to a remuneration out of the society's funds, in case he sustained a loss by fire. This policy was executed under the hands and seals of the de-

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fendants, and the plaintiff has declared that he has sustained a loss by fire, and that the society had funds, and were bound to pay according to the terms of the articles under which it was established. The policy also contains a declaration that the society were to pay according to the deed of settlement, and that the defendants, as directors, should not be subject to any demand for losses, except under the articles establishing the society. Under this stipulation, the plaintiff was entitled to set out such articles in his declaration, and which are now properly brought before the Court. He stated, that they were and are as follows, and then set out the whole of them accordingly; and the eighth article limits the right of action to the insurer, as it provides, that whenever losses should happen, he must give immediate notice to the secretary, that a view might be taken, and the damage estimated, and deliver under his hand the particulars of his claim on the office, and make out the same by oaths of himself or his servants, books or vouchers, for that purpose; and the loss sustained was to be made good by the society within ninety days after the same happened. That clause, therefore, held out that the society were liable to satisfy such loss in case the insurer did all that was required of him to be done within that period. By the ninth article it appears, that the society would not make good any losses by fire occasioned by foreign enemies, or in consequence of explosion of gunpowder or steam, but that their liability attaches only in the ordinary occasions of fire.—This case is wholly distinguishable in fact from that of *Alchorne* v. *Saville*, as here the substance of the policy is set out, and the deed of settlement referred to. In that case there were no sufficient words to raise a covenant by the defendants, as they merely appointed the directors for the time being to pay out of the monies, securities, and effects of the contributionship, pursuant and according to certain deeds and settlements; and the Court thought that the policy imported an order for the payment of money, and not an agreement; and that even if

it could be considered as such, and was declared upon as against the defendants, the plaintiff must have been non-suited on the plea of *non est factum*, because it was not their deed. My Brother *Pell*, however, has contended, that the words "declared and *agreed*," were there introduced in the proviso, whilst here, the words "stipulated and declared" only were used; but the former words were introduced in that case for a very different purpose; for they could have no effect as to the order and direction to the directors for the time being to pay out of the funds of the society. I therefore concur with the Court in thinking that the judgment in this case ought not to be arrested.

Rule discharged (*a*).

(*a*) There was a similar action brought by the plaintiff and his partner against *Gedge* and two others of the directors, to recover a loss for premises destroyed by fire, in which the former carried on their business, and the Jury also found a verdict for them; and the defendants obtained a rule *nisi* for arresting the judgment in that action, which the Court now ordered to be discharged.

RULE OF PRACTICE.

TRINITY TERM, 2d GEO. IV.

Wednesday, July 11th.

IT IS ORDERED, That in future, defendants, on being served with process, or arrested, will be allowed to obtain orders for the particulars of the plaintiff's demand, without waiting till appearance entered, or bail put in, or declaration filed and delivered; and that in this respect, the practice of this Court will be made conformable to that of the Court of King's Bench.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN

MICHAELMAS TERM,

IN THE SECOND YEAR OF THE REIGN OF GEO. IV.

MEMORANDA.

In the course of this Term, died at his house in *Russell Square*, in the eighty-eighth year of his age, the Right Honorable Sir *James Mansfield*, Knight, formerly Lord Chief Justice of the Court of Common Pleas.

Henry Brougham, of *Lincoln's Inn*, Esq. and *Thomas Denman*, of *Lincoln's Inn*, Esq. Attorney and Solicitor General to her late Majesty the Queen, resumed their seats without the Bar, in consequence of her demise in the last vacation.

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SMITH and Others *v.* LEIGH and Others.

A testator devised all his estates to *A. G.* and *T. G.* for one hundred years, upon certain trusts mentioned in his will, and subject thereto he devised them to his wife, during her widowhood, and to *H. P. W.* and *J. S.* and the survivor, and also to the heirs of such survivor of the two latter, on certain trusts therein also mentioned, to the use of divers persons for life and in tail:

A CASE, of which the following is the substance, was sent by the direction of the Vice-Chancellor, for the opinion of the Judges of this Court:—

Charles Penruddocke, Esq. being seised in fee in the undivided moiety or half part of the messuages, lands, tithes and hereditaments called the "*Mixon Hay*," by his will, dated the 30th *December*, 1787, which was duly executed and attested to pass real estates, gave and devised all his manors, messuages, lands, tenements and hereditaments whatsoever and wheresoever, comprising the estate in question, to the use of *Ambrose Goddard* and *Thomas Grove*, their executors, administrators and assigns, for and during the term of one hundred years, without impeachment of waste, upon certain trusts thereinafter mentioned; and after the expiration, or other sooner determination of the said term and subject thereto, to the use of his wife *Anne Henrietta Penruddocke*, he then directed that the three latter trustees should, out of the rents and monies, discharge all his debts, legacies, &c. and that if his personal estate should be insufficient to pay the same, they were to raise and charge the deficiency on the real estate before devised to them: he then declared, that if his personal estate should be insufficient to raise and pay portions for his younger children, *A. G.* and *T. G.* should raise the same by sale or mortgage of the one hundred years term; and all the rest and residue of his real and personal estates, he devised to his wife, *H. P. W.* and *J. S.*, and the survivors and heirs of such survivor of the two latter, on certain trusts thereinafter also mentioned. Then followed a power of sale, in which the testator stated, that "whereas the moiety of several estates had descended to him as one of the heirs at law of the late Mrs. *B. A.*; and whereas it might be convenient to sell any or all of them, either for the portions of his younger children or otherwise, or to divide or proportion the said estates, or any part of them: he thereby empowered *his said trustees* to sell or divide and proportion all or any of the said estates, and that their acts should be valid to all intents, so that the monies arising by the sale of all or any of the said estates, were kept and preserved, and remain and enure to and for the several uses and trusts directed by his will;" and the testator then nominated and appointed his wife, *H. P. W.* and *J. S.* the joint and sole guardians of all his children, and fully and wholly to execute his will, in trust as thereinbefore directed. The testator died, leaving his wife, *H. P. W.* and *J. S.* surviving, who proved the will. *J. S.* afterwards died, leaving the testator's widow and *H. P. W.* his co-executors, who afterwards, by indentures of lease and release, conveyed the moiety of one of the testator's estates to a purchaser in fee:—Held, that such conveyance was a good execution of the power for sale, given by the will of the testator.

as long as she should continue his widow and unmarried, and to *Henry Penruddocke Wyndham* and *James Sutton*, Esquires, and the survivors and survivor, and also to the heirs of such survivor of them the said *Henry Penruddocke Wyndham*, and *James Sutton*, to the use of his eldest son, *John Hungerford Penruddocke* for life; remainder to the said *Anne Henrietta Penruddocke*, *Henry Penruddocke Wyndham*, and *James Sutton* and their heirs, during the life of his (the testator's) son *John Hungerford Penruddocke*, in trust to preserve contingent remainders, nevertheless to permit and suffer his said son *John Hungerford Penruddocke* and his assigns, to receive the rents and profits to his and their own use, during his life; remainder to the first and other sons of the testator successively in tail male, with divers limitations over; and upon this further trust, that they the said *Anne Henrietta Penruddocke*, *Henry Penruddocke Wyndham*, and *James Sutton*, and the survivors and survivor, and the heirs of such survivor, do and shall, out of the rents and arrears of rent due, or becoming due, and also out of the ready monies or other monies in the funds, or on mortgages, bond or other securities, pay and discharge all the testator's just debts, legacies, and funeral expences; and if his personal estate should be insufficient to discharge the same, then *his said trustees* were to raise and charge on his real estate thereinbefore devised to them, as would make up the deficiency; and as for and concerning the said term of one hundred years thereinbefore limited to *Ambrose Goddard* and *Thomas Grove*, their executors, administrators and assigns as aforesaid, the testator declared the same was so limited to them upon the following trusts, that is to say;—upon trust that they the said *Goddard* and *Grove*, and the survivors and survivor of them, and the executors and administrators of such survivor, should, by and out of the rents, issues and profits of the said messuages, lands, tenements, and hereditaments, or by sale or mortgage thereof, if his personal estate should not be sufficient to raise and pay the

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several sums thereinafter mentioned; (that is to say), to each of his younger children, as soon as he, she, or they should attain the age of twenty-one years, over and above the share and shares of money settled on his younger children by his marriage settlement, the sum of 1250*l.*; and after the decease of his wife, the further sum of 1000*l.* to each of them as soon as they respectively should attain that age; and in case his guardians thereinafter named might deem it advantageous to place any of his younger sons, during their respective minorities, to the navy, army, or any law or mercantile business, or might think it advisable to purchase any benefice in the church for any or either of them, in that case they were to raise and pay any sum not exceeding the first sum of 1250*l.*, which was to be in lieu and satisfaction for all or so much of the first sum of 1250*l.* directed to be paid to each of his younger children, as soon as they should respectively attain the age of twenty-one years, as might be wanted for such purposes; and they were also to raise and pay annually, towards the maintenance and education of his younger children, so much as such guardians might require, so that the same should not exceed for each younger child, more than the interest of each younger child's share of the monies settled by his marriage settlement on them, and the first sum of 1250*l.* given by his will:—and all the rest and residue of his goods and chattels, both real and personal, rights and credits, not thereby otherwise disposed of, given or bequeathed, the testator gave and devised to his said wife, so long as she continued his widow and unmarried, *Henry Penruddocke Wyndham* and *James Sutton*, and to the survivors and survivor of them, and to the heirs of such survivor of the two latter:—upon trust, that after paying all his just debts and funeral expences, they should assign and make over all the rest and residue of his goods and chattels, both real and personal, to such eldest child who, by having attained the age of twenty-one years, should be in the actual possession of his real estate, by virtue of his will or otherwise; and in case

neither of his sons or daughters, then or thereafter born, should attain the age of twenty-one years, or in case of failure of male issue from any or either of them, then he gave and devised all his manors, &c. and all his real and personal estate, whatsoever and wheresoever, in possession, reversion, or remainder, unto his wife *Anne Henrietta Penruddocke* for life; and after her decease to his own right heirs for ever. The will afterwards contained the following power of sale:—"And whereas the moiety of several estates in different counties, has descended to me as one of the heirs at law of the late Mrs. *Bridget Ashe* (including, amongst others, the estates in question;) and whereas it may be more convenient to sell any or all of the said estates, either for the portions of my younger children or otherwise, or to divide or proportion the said estates, or any part of them; in either case, I hereby empower *my said trustees* to sell or divide and proportion all or any of the said estates, and their act or acts shall be valid to all intents and purposes, so that the monies or shares of monies arising by the sale of all or any of the said estates, and also the allotments and divisions of all or any of the said estates, are kept and preserved, and remain and enure to and for the several uses and trusts hereinbefore directed, as if the same had not been sold or divided, or otherwise." And the testator thereby nominated and appointed his wife, as long as she continued his widow and unmarried, and the said *Henry Penruddocke Wyndham* and *James Sutton*, the joint and sole guardians of all his children;—nevertheless, his will was, that his wife might have the chief and principal management of all his children, and also of the different concerns before mentioned and directed, with the advice, and subject to the inspection of the said *Henry Penruddocke Wyndham* and *James Sutton*; and the testator did thereby nominate and appoint his said wife, *Henry Penruddocke Wyndham* and *James Sutton*, fully and wholly to execute his will, in trust, as before directed.

By a codicil of the same date with the will, the testator empowered his wife, *Wyndham* and *Sutton*, and the survivors

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and survivor of them, and the heirs of the survivor of the two latter, his trustees named in his will, to grant any collateral security on any of his real estates, by way of a suitable jointure for any wife as his eldest son might choose to take during the lives of the testator's mother and wife, so that such collateral jointure, after their respective deceases, should be transferred from such real estates and charged only on a certain manor and estates, which were settled by marriage settlement on such eldest son; and so that he gave ample security to the said trustees previous to any marriage, for the charging such collateral security by way of jointure on the said manor and estates, after the decease of his mother and wife.

The testator died on the 30th *October*, 1788, without having altered or revoked his will, leaving his wife, *Henry Penruddocke Wyndham* and *James Sutton* surviving, who on the 9th *November*, 1789, proved the will and codicil in the Prerogative Court of *Canterbury*. *James Sutton* afterwards died, leaving the testator's widow and *Henry Penruddocke Wyndham* his co-executors and co-trustees. By indentures of lease and release, duly executed and attested, bearing date respectively the 13th and 14th *July*, 1808, the release of five parts, and made between *William A'Court*, Esq. of the first, the testator's widow and *Henry Penruddocke Wyndham* of the second, the said *John Hungerford Penruddocke* of the third, *Thomas Smith* of the fourth, and *John Fynney* of the fifth part; reciting, that the said *William A'Court* was seised in fee of one undivided moiety of the messuage, lands, tithes and hereditaments thereinafter described and thereby released, or otherwise assured or intended so to be (being the premises in question;) and also reciting the will of the testator, his death, the death of the said *James Sutton* the co-executor and co-trustee, and that the said *John Hungerford Penruddocke* had attained the age of twenty-one, and was the heir at law of his father; and that the said *Thomas Smith* had contracted and agreed with the said *William A'Court* and the testator's widow and

Henry Penruddocke Wyndham, as the surviving trustees under the will of the testator, for the absolute purchase of the fee-simple and inheritance of their respective undivided moieties of the said messuage, &c. free from all incumbrances, at the several sums thereinafter mentioned, and paid as thereinafter expressed, and had requested that the entirety thereof might be conveyed to the uses, upon the trusts, and for the ends, intents and purposes thereinafter expressed and declared, of and concerning the same; and that the said *John Hungerford Penruddocke* assented to and approved of the sale, and had consented to join in the conveyance thereinafter contained:—It was witnessed, that in consideration of 6000*l.* to the said *William A'Court*, paid by the said *Thomas Smith* in full, for the absolute purchase of the undivided moiety of the said *William A'Court*, of and in the messuage, &c. thereinafter described, and thereby released or assured, or intended so to be; and in consideration of the sum of 6000*l.* to the testator's widow and *Henry Penruddocke Wyndham*, in like manner paid by the said *Thomas Smith*, with the consent and approbation of the said *John Hungerford Penruddocke*, and in full for the absolute purchase of the undivided moiety, late of the said *Charles Penruddocke*, deceased, in the said messuage, &c. thereinafter described and thereby released, and the fee-simple thereof; and also, in consideration of ten shillings to the said *John Hungerford Penruddocke*, paid by the said *Thomas Smith*, the said *William A'Court* and the testator's widow and *Henry Penruddocke Wyndham*, according to their respective estates, rights, shares, interests and powers; and as to the said testator's widow and *Henry Penruddocke Wyndham*, with the privity and consent of the said *John Hungerford Penruddocke*, did grant, bargain, sell, release, ratify and confirm, and the said *John Hungerford Penruddocke* did grant, bargain, &c. unto the said *Thomas Smith* (in his actual possession then being by virtue of the said lease), and to his heirs and assigns for ever, the said messuage, &c. (being the estate in question), with their and

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every of their rights, members and appurtenances, and all the estate, right, title, interest, &c. of them the said *William A'Court*, the testator's widow and *Henry Penruddocke Wyndham*, and *John Hungerford Penruddocke*, or any or either of them, of, in, to, out of and upon the said messuage, &c. with their and every of their rights, members and appurtenances, To hold the same (subject to a chief rent of 11*s*. 8*d*. chargeable upon the messuage, lands, &c.), unto the said *Thomas Smith*, his heirs and assigns, to the use of such person or persons, for such estates and for such interests, by way of annuity or otherwise, and in such proportions and upon such trusts, and for such ends and purposes, charged in such manner, and either absolutely or conditionally, and subject to such powers of revocation and of new appointment, and other powers and agreements, as the said *Thomas Smith*, at any time, and from time to time, by any deed or instrument in writing, to be duly sealed and delivered by him, should appoint; and in default of such appointment, and in the mean time, and from time to time until the same should take effect, subject to such uses and interests as should have been directed or limited by the said *Thomas Smith*; then to the use of him and his assigns, for the term of his life, and after the determination of that estate by any means, then to the use of the said *John Fynney*, his heirs and assigns, during the life of the said *Thomas Smith*, upon trust, to and for the sole benefit of the said *Thomas Smith* and his assigns, to the intent that the then present or any future wife of the said *Thomas Smith* might not be entitled to dower; and from and after the determination of the estate thereby limited, to the use of the said *John Fynney*, his heirs and assigns, for the life of the said *Thomas Smith*; then to the use of the said *Thomas Smith*, his heirs and assigns for ever, and to, for and upon no other use, trust or purpose whatsoever.

The question for the opinion of the Court was, whether the before recited indentures of lease and release of the 13th and 14th *July*, 1808, were a good execution of the power or trust for sale, given by the will of the said *Charles Pen-*

ruddocke, over the moiety thereby devised of the messuage and other hereditaments in question ?

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The case was argued in the course of the last Term, when

Mr. Serjt. *Hullock*, for the plaintiffs, submitted, that the indentures of lease and release were a good execution of the power. The only question turns on the construction of the will; and as the testator has charged his real estates thereinbefore devised to his trustees, Mrs. *Penruddocke*, Mr. *Wyndham*, and Mr. *Sutton*, with so much of his debts and legacies as his personal estate should be insufficient to pay, and has given large legacies, and afterwards expressly empowered his trustees to sell, &c. it is clear that they were authorised to sell all or any part of the estates. The power was a general power, and the trustees who exercised it were the persons intended by the testator to do so; and therefore the concurrence of any of the other devisees under the will was not necessary. The clause which gives the power of sale to the three general trustees, operates as a revocation of the preceding uses, including the term of one hundred years. There is no ambiguity as to the particular class of trustees who were to have the power of sale, for it was clearly vested in the latter, in whom the legal inheritance was executed at the time of the sale; for, instead of their being mere devisees to uses, they, in point of fact, took a use in remainder after the first use limited to *Goddard* and *Grove* for the term of one hundred years; and it is evident, that the testator intended that the latter, as trustees of the term, should possess nothing more than a mere ministerial authority, and to act in the trusts under the direction of the guardians of his children, who were his general trustees; and as the amount of the money to be raised under the term, depended not only on the fact of a deficiency of personal estate, but upon the number of children who should become entitled to portions, it certainly was not intended that the

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trustees of such term should exercise any discretion as to the sale of the moiety of the estates in question, or have any interference in the mode of the application of the purchase monies. To remove any doubt as to the three general trustees being empowered by the will to convey, independently of the legal fee having by that instrument been vested in them, it is only necessary to refer to the words of the concluding sentence, appointing them fully and wholly to execute the will, in trust as before directed; and by the codicil, they were empowered to make a provision by way of jointure, for any wife his eldest son might take, during the lives of the testator's mother and wife. Although it may be contended that all the trustees, both of the term and the inheritance, should have joined in the sale, still, there is no authority or decision to warrant such a position, nor was the surrender of the outstanding term of one hundred years necessary to complete the legal title in the latter, as the clause empowering a sale must with regard to such term, operate as a proviso of cesser or revocation, although it should be considered as the only limitation which would require such an operation in a Court of Law.

Mr. Serjt. *Peake*, contrà.—The testator has devised all his estates to two sets of trustees for certain specific purposes, and in the power of sale has merely empowered *his said trustees* to sell or divide the estates, without mentioning any particular set of trustees who were to make such sale. It is therefore uncertain to what class that power was given; and as the conveyance has only been executed by the general trustees, and as it must be inferred that both sets had an equal power to do so, the indentures of lease and release were not a good execution of the power. It is true, there are no authorities applicable to this point, and therefore the construction to be given to the whole of the will can alone prevail. The testator declared, that if his personal estate should be insufficient to pay the portions of his younger children, the

trustees of the term should raise the same by sale or mortgage of that term; they had, therefore, a separate and distinct power vested in them, and the general trustees were merely appointed to protect contingent remainders, and raise money out of the real estate to satisfy the testator's debts and legacies: they had no controul over his younger children but in their capacity as guardians, and were not authorised to raise portions for them. An executor may have a power to convey, and so may a trustee of a term. In the power of sale, the testator states, that "as the moiety of several estates had descended to him, and that as it might be more convenient to sell any or all of them, either for the portions of his younger children, or otherwise, he thereby empowered *his said trustees* to sell or divide the same, so that the monies arising from the sale were kept and should enure for the uses and trusts directed by the will." The two first trustees are equally empowered to raise money by sale or mortgage as the three latter. There is therefore no ambiguity in the will, and as the testator intended that all the trustees should be vested with an equal and general authority, they should all have been joined in the sale. On these grounds, therefore, the conveyance by the general trustees alone, was a bad execution of the power.

Mr. Serjt. *Hullock*, in reply.—It is admitted that this is a question of mere construction, to be collected from the whole of the will, from which no doubt can exist of the intent of the testator, as to which set of trustees were empowered to sell. Although the trustees of the term were directed to raise portions for his younger children by sale or mortgage, yet such direction applied only to the interest they had in that term; but by the power of sale it was stated by the testator, that "it might be convenient to sell any or all of his estates, either for the portions of his younger children or otherwise, or to divide or proportion them or any part of them," thereby clearly meaning that his general trustees

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should be invested with authority to sell, divide, or proportion the estates, and that they alone should have power to make a perfect, complete and valid sale.

Cur. adv. vult.

The following certificate was afterwards sent to the Vice Chancellor :—

This case has been argued before us by counsel :—we have considered it, and are of opinion, that the indentures of lease and release of the 13th and 14th *July*, 1808, were a good execution of the power or trust for sale, given by the will of *Charles Penruddocke*, over the moiety thereby devised of the messuage and other hereditaments in question (*a*).

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

(*a*) See *Townsend* v. *Wilson*, 1 Barn. & Ald. 608. *Roper* v. *Halifax*, Sugden on Powers, 3rd edit. Appendix, page 641.

Tuesday, Nov. 6.

WARD, Demandant; PALMER, Tenant; Earl of COVENTRY, Vouchee.

By a recovery suffered in 1759, premises were described as consisting of "a mill, lands, and hereditaments in the parish of *M.*" By a deed of bargain and sale in 1771, "all the tithes and hereditaments, except in *M.* were conveyed," which, it was stated, were comprised in the recovery of 1759, and were accordingly omitted in the latter:—Held, that such tithes did not pass by the first recovery; but as it appeared that the tithes of all the vouchee's estates were intended to pass by the latter, except those which were supposed to have been included in the first; the Court permitted the latter to be amended by inserting the "tithes in *M.*"

MR. Serjt. *Lens* moved that a recovery which had been suffered in the year 1771, might be amended, by inserting after the words "all the tithes in the parish of *Bingley*, in the county of *Gloucester*," "and also all the tithes of corn, &c. in

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Mickleton, in that county." He founded his motion on an affidavit which stated, that in 1759, the late Earl of *Coventry* being seised in tail, by a deed of bargain and sale for the purpose of suffering a recovery, conveyed all the messuages in the manor of *Mickleton*, and all the farms, &c. thereto belonging; that a recovery was accordingly suffered in that year, in which the word "tithes" was not mentioned, as the premises were described as consisting of a mill, lands, and hereditaments in *Mickleton*; that they were then leased to a person of the name of *Mills*, and that the tithes were not demised in the lease. By the deed of bargain and sale in 1771, all the tithes and hereditaments within any other town or parish in *Gloucestershire*, except *Mickleton*, were conveyed, which it was stated were comprised in the recovery of 1759; and in the latter instrument, the tithes in *Bingley* only were inserted, and those of *Mickleton* omitted. There were also affidavits of the continuance of possession since 1771; and it was stated, that the late Earl of *Coventry* died in 1809, and devised all his estates to the present Earl in tail. Under these circumstances, the learned Serjeant contended, that the tithes arising in *Mickleton* might have passed in the first recovery, the word "hereditaments" being sufficient for that purpose; if not, that it was the intent of the late Earl, that all the tithes should pass in the second, except those arising in that parish, which he supposed had been included in the former.

The Court were of opinion, that they did not pass by the first recovery; but as it appeared that the tithes of all the estates were intended to pass by the second, except those which were supposed to have been included in the first, they permitted the amendment.

1821.

Wednesday, Nov. 7.

WILLIAMS *v.* SAWYER, Esq.

An agreement between landlord and tenant, for the latter to give up the principal part of a farm to the former, who was to purchase the stock thereon at a valuation, and the tenant was to hold over half the house without paying rent, and deliver up the same at a subsequent day;—requires a surrender stamp under the 55 *Geo.* 3. *c.* 184, Sched. Part 1, as such agreement operates as a surrender of the term: Held, therefore, that an agreement stamp was insufficient.

THIS was an action of trespass brought against the defendant as late sheriff of *Berkshire*, for taking farming stock and household furniture under an execution against a person by the name of *Palmer*. Plea, Not Guilty.

At the trial of the cause before Lord Chief Justice *Abbott*, at the last assizes at *Abingdon*, it appeared that *Palmer* held the lands on which the distress was taken, as tenant to the plaintiff, under a memorandum of an agreement on unstamped paper, dated in *July* 1817, but it did not appear whether he was tenant for years or at will; and the only question was, whether the stock and goods belonged to *Palmer* or the plaintiff, to whom the former was in arrear for rent. A written agreement dated the 27th *October*, 1819, was given in evidence for the latter, by which it appeared that *Palmer* agreed to deliver up the immediate possession of the principal part of the farm to the plaintiff, who, in consideration thereof, agreed to purchase the stock, &c. upon it, except one rick of hay, at a valuation, and to make a compensation for the fallows, which the plaintiff, or his incoming tenant, was to enter upon immediately; all taxes, rates, &c. in respect of the farm, to be paid by *Palmer* up to the 10th *October* preceding the agreement; and he was to be permitted to hold over half of the house, stable, and barns, and have the joint use of the yard and cow-pens with the plaintiff or his incoming tenant, up to the 27th *January* ensuing, without paying any rent or taxes for the same. The penalty had been paid for stamping this instrument, which was stamped with an agreement stamp of twenty shillings, and signed by the plaintiff and *Palmer*;—when it was objected for the defendant, that although such stamp would be sufficient if it were a mere agreement, still, that as in point of fact it amounted to a surrender of the term, it required a stamp of

1*l.* 15*s.* by the statute 55 *Geo.* 3. *c.* 184, Sched. Part I. tit. "Surrender"(*a*). His Lordship was of opinion, that the objection was well founded, and consequently directed a nonsuit; but he reserved the question for the consideration of the Court.

Mr. Serjt. *Bosanquet* now applied for a rule *nisi*, that this nonsuit might be set aside and a new trial granted, and observed, that if the agreement had related only to the giving up or sale of furniture or goods, it would have required no stamp, as it would have fallen within the exemption, tit. "Agreement"(*b*) in the statute; but as part of it related to the quitting possession of the farm, it had been properly stamped with an agreement stamp, as it did not amount to an absolute surrender, but merely to an agreement to give up part of the farm, and for the plaintiff to take the stock at a valuation, and that *Palmer* was to continue in possession of part of the premises, &c. for three months after the date of the agreement, at the end of which period, he was to give up the other part of the farm. It is true no precise form is necessary to shew a surrender in terms; but in order to constitute such surrender, the whole possession must be given up at the time, and here, as *Palmer* was allowed to remain in possession of part of the farm, it was a mere agreement, and not a formal surrender, but,

Per Curiam.—The plaintiff, by the terms of this instrument, was to be entitled to immediate possession, subject to the exception of *Palmer's* continuing in the enjoyment of part of the house and premises for a limited period. It is

(*a*) Page 1603. "Surrender (not otherwise charged in that schedule, nor expressly excmpted from all stamp duty) of any term or terms of years, or of any freehold or uncertain interest in any lands, hereditaments, or heritable subjects, not being of copyhold or customary tenure."—1*l.* 15*s.*

(*b*) Page 1554. "Memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, or merchandize."

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quite clear, that a party may surrender his interest of one part of lands immediately, and the other part on a subsequent day. An absolute surrender, and an agreement to surrender, must bear the same construction, and more particularly so in this case, as the agreement was tantamount to a surrender, for nearly the whole of the lands were absolutely given up at the time the instrument was executed.

Rule refused.

Friday, Nov. 9.

HOLL and Others *v.* PINSENT.

By a charter-party to Government, for transporting emigrants from this country to the *Cape of Good Hope*, the defendant, a ship broker, on behalf of the owners, let a vessel to the Commissioners of the Navy, for the space of —— calendar months certain, and thenceforward until they should give him notice that she was discharged, such notice to be given after her return to *Deptford* or *Portsmouth*; and the Commissioners covenanted to pay freight at the rate of 14*s. per* ton *per* calendar month for so long time as the vessel should be continued in his Majesty's service; and that after she had been in such service six months, the defendant should have a bill of imprest for two months freight more; and after ten months a like bill for two months; and a like bill whenever eight months should be due; and the following memorandum was written in the margin:—"Notwithstanding it is herein agreed that the ship shall be discharged at *Deptford* or *Portsmouth*, it is hereby covenanted, that she shall be discharged at the *Cape of Good Hope*, when the service will admit of it:"—Held, that under the terms of the charter-party, the voyage was general, and that the ship was chartered for an indefinite period, and that the defendant was only entitled to claim commission as for a voyage of that description, and not for a specific voyage outwards.

THIS was an action of *assumpsit* for money had and received. The defendant pleaded the general issue, and gave a notice of set-off for work and labour, as the broker or agent of the plaintiffs, and for commission due to him in respect thereof.

At the trial of the cause before Mr. Justice *Park*, at *Guildhall*, at the Sittings after the last Term, it appeared that the plaintiffs were owners of a ship called the *Stentor*, and that the defendant, as their broker, had chartered her to Government for the purpose of transporting emigrants from this country to the *Cape of Good Hope*; and the only question was, whether he was entitled to a commission of two, or five *per cent.* for causing such charter-party to be effected? The defendant having received the amount of the

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freight from Government, refused to pay it to the plaintiffs without deducting his commission of five *per cent.*; they then allowed him to retain it, but under a protest that he was not entitled to make such a charge, and then brought this action to recover the difference. For the plaintiffs it was proved, that the regular rates of commission were two *per cent.* on a regular transport charter-party for an indefinite time and to be discharged in *England*, and five *per cent.* for outward freight generally, and upon transport charter-parties for a specific voyage outwards. The charter-party in question was in the following terms, *viz.* that the defendant, on behalf of the owners, had let the vessel to the Commissioners of the Navy for the space of ——— calendar months certain, and thenceforward until they should give him notice that she was discharged from such service, such notice to be given after her return to *Deptford* or *Portsmouth*:—and the Commissioners covenanted to pay the defendant freight at the rate of 14*s.* *per* ton *per* calendar month, for so long time as the vessel should be continued in his Majesty's employ; and that after she should have been in the service six months, the defendant should have a bill of imprest made out and registered for two months freight more; and after ten months, a like bill for two months freight more; and in like manner a further bill for two months freight, whenever eight months should be due, leaving always at least six months pay in arrear for the security of Government, during the ship's continuance in the service. The following memorandum was written in the margin:—"Notwithstanding it is herein agreed, that the ship shall be discharged at *Deptford* or *Portsmouth*, it is hereby covenanted and agreed, that she shall be *discharged at the* Cape of Good Hope *when the service will admit of it*, with an allowance of one month's pay for being discharged abroad." For the plaintiffs, it was contended, that this was in the nature of a charter-party for an indefinite time; and for the defendant, it was submitted, that it was a

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specific charter-party from this country to the *Cape of Good Hope*. The learned Judge was of opinion, that it was a charter-party for an indefinite period, or general hiring; and the Jury accordingly found a verdict for the plaintiffs.

Mr. Serjt. *Lens*, on the first day of this Term, applied for a rule *nisi*, that this verdict might be set aside and a new trial granted, on the ground of a misdirection by the learned Judge as to the legal construction of the charter-party; and insisted that the outward charter was a special, and the latter a positive contract, and that the memorandum in the margin made it in substance a charter for a specific and definite voyage to end at the *Cape*. Besides, the regular charter-party in cases of this nature is usually filled up for six calendar months certain, whilst here, a blank was left; for it stands "———— calendar months certain," omitting the word "six;" so that in point of fact there was no engagement for any certain time whatever. It is therefore neither more nor less than an engagement for a specific voyage to the *Cape*.

Mr. Justice PARK on this day observed, that under the terms of the charter-party, he had considered at the trial, that the vessel was chartered for an indefinite period, and that the Commissioners of the Navy might have kept her as long as they might deem her necessary for the service, and that he directed the Jury accordingly;—that on a re-perusal of that instrument, he continued of the same opinion. Throughout the whole of the charter-party, no mention whatever is made as to the continuance of the voyage. The master was to be under the controul of the Commissioners during the continuance of the ship in his Majesty's service, and the freight was to be paid at definite periods according to the number of months she should remain in such service. Neither does the memorandum appear to controul the charter-party, so as to render it a specific and definite voyage to

the *Cape*, for she might proceed to *India*, and discharge at the *Cape* on her return, or when the nature of the service would admit of it.

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The rest of the Court being of opinion that the voyage was general and indefinite under the terms of the charter-party.

Rule refused.

DOE, on the Demise of RUDD and BARBER *v.* GOLDING.

Friday, Nov. 9.

THIS was an action of ejectment. The declaration contained two several demises; the one from *Barber*, and the other from *Rudd*.

Where a lease contained two clauses for re-entry, the one, in case the yearly rent of 300*l.* was in arrear thirty days after it became payable; and the other, in case the yearly rent were in arrear, which was stated to be payable half-yearly at *Lady-day* and *Michaelmas*:—Held, that the landlord had a right to re-enter on non-payment of each half-year's rent, as the former clause contained the description of the amount to be annually paid, and the latter the times of payment.

At the trial of the cause before Mr. Justice *Richardson*, at the last Assizes at *Norwich*, it appeared, that *Rudd* was the owner of the premises, and that the defendant held under a lease from him, which would expire at *Michaelmas*, 1824; that there were two conditions of re-entry contained in it; first, a right of re-entry if the yearly rent of 300*l.* was in arrear and unpaid thirty days after it became payable; and secondly, a similar power, in case the yearly rent was in arrear, which was stated to be payable half-yearly, *viz.* at *Lady-day* and *Michaelmas*. It was proved that the defendant had paid rent to *Lady-day*, 1820, under a distress, and that half-a-year's rent became due at *Michaelmas* following, and that the demises were laid on the 1st of *January*, 1821. The Jury found a verdict for the plaintiff.

Mr. Serjt. *Blosset* now applied for a rule *nisi*, that such verdict might be set aside and a nonsuit entered; and submitted, that the plaintiff had no right to re-enter until thirty days after one whole year's rent had become payable, and

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more particularly so, as a clause of forfeiture must be construed most strictly.

But the Court were of opinion, that he had a right to re-enter on non-payment of each half-year's rent, and that the former clause contained the description of the amount of the rent to be annually paid, and the latter the times of payment.

Rule refused.

Saturday, Nov. 10.

RANDALL, Plaintiff; LOWRING and Others, Deforciants.

The certificate of a notary of the acknowledgment of a fine taken abroad, must be written on parchment; and a literal translation of it engrossed on parchment, and referring to the original, will not supply the defect.

MR. Serjt. *Pell* moved that this fine might now pass, the acknowledgment of which had been taken at *Florence*; but the certificate of the notary there had been written on paper. He produced an affidavit to shew that the certificate had been literally translated and written on parchment; and that the original certificate was in the same terms as those afterwards transcribed on parchment. He also observed, that it was the constant practice at *Florence*, for instruments of a like nature to be written on paper.

But the Court held, that it was necessary for the certificate as well as the affidavit of taking the acknowledgment to be written on parchment, and that the translation and transcription did not supply the defect; and they referred to the case of *Palmer*, Plaintiff; *Morgan*, Deforciant (*a*); where it was decided, that the affidavit of taking an acknowledgment abroad, must be engrossed on parchment; and that even if it had been written on paper and pasted on parchment, it would not have been sufficient.

(*a*) Ante, vol. iv. page 162.

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The learned Serjeant therefore took nothing by his motion (*a*).

(*a*) By rule, *H. T.* 17 *Geo.* 2, it was ordered, that "An affidavit of the due acknowledgment of a fine, must be made in writing on parchment, and annexed to such fine;" and by rule, *H. T.* 14 *Geo.* 3, it was ordered, that "If a recovery be suffered beyond sea, an affidavit in writing on parchment must be made and annexed to a copy of the *præcipe* and warrant of attorney by one of the Commissioners who had taken the acknowledgment of such warrant, and should be sworn either before some person duly authorised to take affidavits in this Court, or before some magistrate of the place where such acknowledgment should be taken, having authority to administer an oath, and in the presence of a public notary, which notary should also certify in writing under his hand and seal, as well the due administering of the said oath, as also the name, signature, and office of the magistrate administering the same."

RUSSELL *v.* DUNSKEY.

Monday, Nov. 12.

THIS was an action of *assumpsit* for money had and received.

By a memorandum of adjustment indorsed on the back of a policy, it was stated, that a particular average loss of 54*l. per cent.* had been settled between the plaintiff (an underwriter) and defendant:—Held, that parol evidence was admissible to shew, that by a previous arrangement, it was agreed, that if the other underwriters paid a less sum, the surplus should be re-paid.

At the trial of the cause before Mr. Justice *Park*, at *Guildhall*, at the Sittings after the last Term, it appeared that the plaintiff was an underwriter, and as such had underwritten a policy for *Simpson* and *Co.*; on the back of which was indorsed the following memorandum of adjustment:—"Settled a particular average loss by plunder of 54*l.* 10s. 11*d. per cent.*" The person who signed this memorandum was called, who proved that it had been previously agreed by parol between the plaintiff and defendant, that if the other underwriters on the policy should eventually pay a less sum than 54*l. per cent.* the surplus, whatever it might be, should be returned. It was objected, that this evidence was not admissible, as it was offered for the purpose of contradicting the adjustment which had been written on the policy; but the learned Judge over-ruled the objection, and the Jury accordingly found a verdict for the plaintiff.

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Mr. Serjt. *Vaughan* now applied for a rule *nisi*, that this verdict might be set aside and a new trial granted; and submitted, that although there might have been a previous agreement between the parties, still, that it constituted but one transaction, and that the terms of the adjustment on the policy could not be contradicted by parol testimony.

But the Court were clearly of opinion, that the evidence was admissible; and more particularly so, as the agreement was entered into before the terms of the adjustment were indorsed on the policy; and

Lord Chief Justice DALLAS observed, that the cases which bore the nearest resemblance to the present, were those of *Hoare* v. *Graham* (*a*), and *Hogg* v. *Snaith* (*b*), in the former of which it was decided, that in an action on a promissory note, a defendant cannot give evidence of a verbal agreement between him and the plaintiff at the time of making the note, that it should be renewed, and that payment should not be demanded on its becoming due; and in the latter, evidence of an usage at the Navy Office was held inadmissible to enlarge the operation of a power of attorney to pay bills indorsed by the attorney in his own name, and negotiated by him under such a power. In the one case, the parol condition was inconsistent with the note; and in the other, the usage was adduced to enlarge the terms of the power, and alter its operation. Here, however, the evidence was admissible to shew the terms on which the adjustment was made.

Rule refused.

(*a*) 3 Camp. 57.——(*b*) 1 Taunt. 347.

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Same *v.* SLADE and Others.

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Where the Prothonotary, on the taxation of costs, allowed for various sums expended in experiments, and a compensation for loss of time to scientific and professional men employed in making them, with a view to ascertain the increased risk or advantage in a new process of boiling sugar by means of heated oil, and who were called as witnesses at the trial: the Court directed him to review his taxation, on the ground that no such allowance or compensation ought to be made.—Where the plaintiffs brought four actions against two insurance companies, for a loss by fire, and a verdict was found for the former against each company, on two of the causes only:—Held, that costs were to be apportioned equally, although three causes only were set down for trial at the same Sittings, there being a demurrer pending in the other.

MR. Serjt. *Hullock* on a former day in this Term, obtained a rule *nisi*, that the Prothonotary might review his taxation of the costs which he had allowed to the plaintiffs in those causes, under the following circumstances:—In the case of *Severn* v. *Olive*, the action was brought by the plaintiffs who were sugar refiners, against the defendants as the directors of the *Imperial Insurance Company*, upon a policy of assurance to recover 500*l.* part of a loss sustained by the plaintiffs, in consequence of a fire which happened upon their premises in *November*, 1819; the defendants in that action pleaded several pleas, upon all of which, with the exception of two, issues were joined, and to those two, the plaintiffs demurred: the demurrer was set down for argument, and on its coming on to be heard, the Court suggested, that one of the pleas should be amended, which was accordingly done and issue taken thereon; as to the other, the Court was never called upon for judgment. Notice of trial was afterwards given for the Sittings after *Trinity* Term, 1820, but the cause was made a *remanet* until the Sittings after the following *Michaelmas* Term. In the issues joined, there was involved amongst others, a question, whether or not the risk of the Company was increased by the introduction of a new process of boiling sugar by means of heated oil.—The case of *Severn* v. *Slade*, which was an action by the plaintiffs against the directors of the *Imperial* on another policy, and two other causes, in which the same parties were plaintiffs, and the directors of the *Phœnix Insurance Company*, defendants, and arising out of the same accident

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by fire, were appointed for trial at the same time, but the two latter being first upon the list, one of them came on to be tried on the 13th *December* last, and occupied the whole of that and five succeeding days, when a verdict was found for the plaintiffs; in consequence of which, the *Imperial Insurance Company* paid the damages sought to be recovered in the action of *Severn* v. *Olive*, and a Judge's order was afterwards obtained to stay the proceedings in that cause, upon payment of the plaintiffs costs, to be taxed by one of the Prothonotaries. The taxation was accordingly made, and concluded on the 7th *July* last, under which the Prothonotary allowed a considerable sum on account of the expences of various experiments which had been made and conducted at the instance of the plaintiffs, by several chemical and philosophical persons, with a view of enabling witnesses to give evidence upon the trial of that and the other causes, upon the properties of heated oil. He also allowed to the plaintiffs a large sum for expences incurred by them, in the conveyance of one Doctor *Thompson*, a lecturer at the University of *Glasgow*, from thence, on three different occasions, to attend the trial of *Severn* v. *Olive*, as well as for his loss of time and expences in *London*; and also for the time employed by him in making such experiments, and who was examined on the trial of the cause against the *Phœnix Company*, but did not give evidence of any facts connected with the fire, his testimony being confined to chemical results, and conclusions and opinions formed by him as arising therefrom. The Prothonotary also allowed to the plaintiffs in *Severn* v. *Olive*, one-half of the expences of the witnesses who gave evidence at the trial of the cause (wherein the directors of the *Phœnix* were defendants), and who were also *subpœnaed* to attend as witnesses in the former cause, as well as one-half of the expences attending the conducting the experiments, and of bringing Doctor *Thompson* from *Glasgow*. In the case of *Severn* v. *Slade*, a similar action was brought against other directors of the *Imperial Insurance Company*, to recover 7000*l.*, as part of the loss insured against by the

plaintiffs on another policy, in which several issues were joined; and upon the trial thereof, on the 11th, 12th, and 13th *April*, 1820, one of the questions raised by the pleadings, was the same as in the action of *Severn* v. *Olive*, *viz.* whether the risk of the Company was increased by the introduction of a new process of boiling sugar with heated oil; which the Jury found in the negative, and returned a verdict for the plaintiffs. In *Easter* Term, 1820, the Court was moved on the part of the defendants, for a new trial, upon the ground that the verdict was against the weight of evidence, and a rule *nisi* was granted, which was enlarged until the succeeding *Hilary* Term, when the cause in which the directors of the *Phœnix* were defendants, involving amongst others, the same question as that which was raised on the trial of the cause of *Severn* v. *Slade*, having been in the mean time tried, and a verdict found for the plaintiffs, the rule for the new trial in the latter was abandoned by the defendants. Pending such rule, an arrangement was entered into, under which the plaintiffs received the amount of the damages sought to be recovered in that action, upon their engaging to return the same with interest, in case the defendants should set aside the verdict, and ultimately succeed in their defence. A Judge's order was afterwards obtained by consent to stay the proceedings in that action, upon payment of costs to be taxed by the Prothonotary, in which he apportioned the costs, one-half to be paid by the *Imperial*, and the other half by the *Phœnix*.

The learned Serjeant objected, first, as to the allowance of any part of the expences in bringing Doctor *Thompson* from *Glasgow*, as he did not prove any fact connected with the fire within his own knowledge, but merely detailed the result of various experiments made by him on the employment of oil in the boiling of sugar, and gave an opinion on the comparative danger of the old and new processes; secondly, as to the allowance of any part of the expences incurred by the plaintiffs in conducting those experiments;

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or for the time of the scientific and professional persons who had been employed in making them; and, thirdly, as to the mode in which the costs had been apportioned; and that as there were two causes against the *Phœnix Company*, and only one against the *Imperial* entered for trial at the same time, the expences of the experiments (if any should have been allowed) ought to have been apportioned either separately or in thirds, as well as the other expences of the witnesses; instead of the proportion of one half, as allowed by the Prothonotary.

Mr. Serjt. *Lens*, Mr. Serjt. *Vaughan*, and Mr. Serjt. *Taddy*, now shewed cause. The items objected to by the defendants, are the sums paid by the plaintiffs to scientific witnesses, for making experiments in oil, with a view to ascertain its properties and effects when heated and used in the manner adopted by them at their sugar house. The defendants pleaded that the plaintiffs had introduced into their premises a process of boiling sugar with oil, which was more dangerous than that formerly adopted, by which the loss by fire arose, and consequently, that they were not liable according to the terms of their policies. Until such pleas were put in, the plaintiffs had no notice of the defendants objection to pay the amount of the loss, and the effect of the application of oil in the process of boiling sugar, was not previously in question in the cause:—On the plaintiffs receiving notice, that the defendants were employing scientific men to conduct experiments with reference thereto, they were also induced to adopt a regular course of experiments, and to employ scientific and professional persons to investigate the subject. The result derived from those experiments was directly applicable to, and formed a necessary part of the evidence to be adduced for the plaintiffs at the trial. The expences in question, therefore, cannot be distinguished, in principle, from those incurred in furnishing evidence in ordinary cases on a matter of fact, which are always allowed on taxation of costs. The most eminent and professional che-

mists differed in opinion as to the result of using heated oil in the manufacture of sugar, as carried on by the plaintiffs; and the experiments made by them were for the mutual advantage of both the plaintiffs and defendants, and they were not only material, but absolutely necessary. The testimony of those persons was confined to chemical experiments, from which alone could the point in issue have been ascertained.—With respect to the allowance to Doctor *Thompson*, and the other scientific and professional witnesses, for their loss of time in attending at the trial; although it is true, that witnesses in general are entitled to no compensation for such loss, still, professional men of science must be considered to fall within the exception of medical men and attornies: besides, two of the witnesses in question were physicians; but it may be said, that they did not attend to give evidence on a subject connected with their professional avocations; but the real ground of exception should be the lucrative exercise and application of a scientific profession or acquirement. The case of *Moor* v. *Adam* (*a*), narrowed the principle before adopted, as to compensation to witnesses for loss of time; and in *Willis* v. *Peckham* (*b*), the witness lived within the bills of mortality, and Lord Chief Justice *Dallas* there observed (*c*), that "he had incurred no expences during his attendance at the trial, as all his refreshments were paid for by the defendant; besides, he had no distance to come." Here, however, it was quite the reverse. In *Lopes* v. *De Tastet*, it appears that the Prothonotary allowed 1000*l.* to the captain of a *Spanish* vessel, for the loss of a voyage by him, and the time he was detained in this country before the trial took place.—Lastly, as to the apportionment;—the defendants, as well as the plaintiffs, had the benefit of the experiments, and as two actions were brought against the *Imperial Insurance Company*, and two against the *Phœnix*, the Prothonotary has properly decided, that those two companies should share the expences equally; for in point of fact, although all the causes were set down for

(*a*) 5 Maul. & Selw. 156.——(*b*) Ante, vol. iv. page 300.——(*c*) Id. 302.

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trial, it was matter of notoriety that the result of one would in effect amount to a settlement of the whole.

[Mr. Prothonotary *Ray* observed, that with respect to Doctor *Thompson*, he had allowed him for his loss of time, in consequence of his being a lecturer, and having several pupils at *Glasgow*, and that he was obliged to employ a substitute at a considerable salary during his absence; that he had also made a compensation to him for the employment of his intellect, as well as his manual labour in making the experiments in question. That it was the invariable practice, if a clergyman came from a distant county to give evidence in *London*, and paid a curate during his absence, to make him an allowance accordingly; that no case had occurred within his recollection, where specific experiments were made; but in *Boulton* v. *Hornblower*, which was an action on a patent respecting a new invention as to a steam engine, the witnesses were allowed all their travelling expences, and one guinea *per* day for loss of time; that the most eminent and experienced physicians were allowed the same compensation as young practitioners, *viz.* three guineas *per* day: that barristers had been allowed one guinea *per* day; whilst, on the other hand, surveyors and engineers were deemed to be entitled to no remuneration for loss of time, as they derived a profit from the nature of their previous employment.]

Mr. Serjt. *Hullock*, in support of the rule. There appears no instance where an allowance has ever been made for experiments, or any expences which may have been incurred to ascertain the result which may be afforded by such experiments. In *Lopes* v. *De Tastet*, the witness was a foreigner and commander of a vessel, and was therefore entitled to a liberal compensation, as he lost a voyage in consequence of his having been detained in this country. *Willis* v. *Peckham* is decisive to shew, that a witness attending a

trial under a *subpœnâ*, is not entitled to a compensation for his loss of time. In *Atkinson* v. *Sadler*, which was tried at *York*, the plaintiff's attorney charged the defendant in his bill of costs, with the loss of time of several of the witnesses engaged in the cause; which upon taxation, the Master disallowed; and on a motion to the Court for him to review it, Lord *Ellenborough* observed, that although he lamented the practice, yet it was the duty of a subject to attend, and more particularly so, as he might exact the same attendance from others. The Court of King's Bench has also determined, that insurance brokers are not entitled to compensation for loss of time (*a*). Merchants of every description are generally allowed no more than their expences. It is extremely doubtful, whether a payment for loss of time can be allowed to a physician, as he can make no charges nor sue for fees: besides, men of great and extensive practice might visit fifty patients in the course of a day, and therefore require fifty guineas as an equivalent for their loss of time in attending a trial. In cases of collieries and mines, where scientific persons are engaged, and brought from great distances to examine them from day to day, and take plans to enable them to give an opinion at a trial, they have no preparatory expences allowed them on the taxation of costs. So, in the case of a view, a witness is allowed no expences. If the process in question was new, the plaintiffs ought to have made the experiments before they adopted or used it: and if they knew the effects of it before, such experiments were altogether superfluous and useless. At all events, the costs should have been apportioned separately, or in thirds, for when the causes came on for trial, there were only three inserted in the list; witnesses were *subpœnaed* to attend those causes only, and the costs of one sitting cannot be blended with those of an anterior one.

Lord Chief Justice DALLAS.—I am of opinion, that in these cases the Prothonotary must review his taxation. It

(*a*) These cases have not been reported.

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does not appear to me that the expences incurred in making experiments ought to be allowed; nor ought there to be any compensation to those scientific witnesses who were employed in making them, *quasi* loss of time, as such allowance appears to be confined to medical men and attornies only. It has been said, that this rule does not extend to physicians practising as such, but I think they ought to be entitled to a remuneration, not according to the number of fees they may obtain in one day, but according to the average rate as stated by the Prothonotary. Besides, on principle, their loss of time is a loss of profit, for other physicians could not attend patients which they were in the constant habit of visiting and prescribing for. The case of *Willis* v. *Peckham* is decisive to shew, that a witness attending the trial of a cause generally, is entitled to no remuneration for loss of time, nor has any allowance for such loss been ever made to a mechanic of any description. It is true, that evidence of persons of skill, is not only admissible, but highly desirable, but are they to acquire knowledge by any experiments they may think proper to make, at the costs of the party? I think not, the time of the poor man may be equally as important to him as that of the rich.—With respect to the apportionment, I think the costs ought to be borne by the two companies in moieties, and therefore that the Prothonotary has acted rightly as to this part of his taxation.

Mr. Justice PARK.—In *Moor* v. *Adam*, two of the witnesses were merchants at *Alicant*, and yet it was held that they were entitled to no compensation for their loss of time.

Mr. Justice RICHARDSON.—It is quite clear, that persons in the legal and medical professions only, are entitled to an allowance for loss of time, during their attendance at a trial as witnesses.

Rule absolute.

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GILMAN *v.* ELTON.

Tuesday, Nov. 13.

THIS was an action of trover, brought to recover the value of a quantity of bombazines.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the adjourned Sittings after the last Term, a verdict was found for the plaintiff, damages 196*l.*, subject to the opinion of the Court on the following case:—The plaintiff, who is a bombazine manufacturer at *Norwich*, had been in the habit of sending parcels of goods for sale upon commission, to the late *Thomas Milne*, now deceased, who was a factor and broker, and who traded on his own account. On the 16th *February* and the 5th *March*, 1819, the goods in question were packed in bales, and marked "J. G.," being the initial letters of the plaintiff's name, with letters of advice from him to *Milne*, to be by him, as such factor of the plaintiff, sold for the account of the plaintiff, in the usual course of their business, and were received by *Milne*, on the 10th *March*, at his ware-room and counting-house, which he rented of the defendant, in *Walbrook*, in the city of *London*, as a yearly tenant. On the 6th *March*, 1819, the plaintiff drew a bill of exchange of that date, on *Milne*, for 200*l.*, on account, which bill *Milne* accepted, and returned to the plaintiff, who afterwards cashed the same with his bankers, at *Norwich*; and the bill, after the death of *Milne*, was duly presented to the banker's agents, in *London*, for payment, at the late ware-room and counting-house of *Milne*, and returned not paid. On the 16th *April*, 1819, *Milne* died, and the goods then remained unsold in the ware-room. On the following day, the defendant distrained them for 93*l.*, his arrears of rent due from *Milne*, for the ware-room and counting-house. On the 21st of the same month, a formal demand of the goods was made, on behalf of the plaintiff, upon the

Goods of a principal, in the hands of a factor, for sale, are privileged from distress for rent due from such factor to his landlord; on the ground that the rule of public convenience, out of which the privilege arises, is within the exemption of a landlord's general right to distrain, and therefore that such goods are protected for the benefit of trade.

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defendant, who thereupon refused to deliver them up to him, alleging as a reason for his refusal, that he detained them under the distress.

The question for the opinion of the Court was, whether, under the circumstances above stated, the plaintiff was entitled to recover. If they should be of opinion that he was, the verdict was to stand, but if of a contrary opinion, then a verdict was to be entered for the defendant.

The case now came on for argument, when

Mr. Serjt. *Marshall*, for the plaintiff premised, that it embraced a question of considerable importance as well as of novelty, *viz.* whether goods, in the hands of a factor for sale, can be legally distrained by a landlord for rent due to him from such factor. As there is no decision in point, the case must be determined on principle. It is true, that all goods not affixed to a freehold, are generally liable to be distrained by landlords for rent. This rule, however, is subject to several exceptions, one of which is, that goods delivered to a person exercising a public trade to be worked up, or disposed of by him in the exercise of such trade, are not distrainable, although no others may be found on the premises: and here it does not appear that there were not other goods at the time the distress was made. Although the property of third persons is generally liable to distress, yet the bombazines in question were not, as they were deposited with a factor, and therefore fell within the above exemption, which was made in favor of trade and commerce. Corn or meal sent to a mill or market, cannot be distrained (*a*). So, a horse in a smith's shop cannot be distrained for the rent of the shop: cloths or garments at a taylor's, or materials for cloth at a weaver's, are not liable to distress, as being privileged for the benefit of trade (*b*), though the cloth, &c. be many days at the shop (*c*). In *Read* v. *Burley* (*d*), it was

(*a*) Co. Lit. 47 (a). 1 Roll. Abr. 668, pl. 11.——(*b*) Com. Dig. tit. Distress, (C). Co. Lit. 47 (a). Bro. Abr. tit. Distress, pl. 70.——(*c*) 1 Roll Abr. 668, pl. 13.——(*d*) Cro. Eliz. 549. 596. S. C. *nomine* *Burley* v. *Read*, Noy, 68.

held, that if a horse goes with yarn to a weaver, or fetches yarn thence, and carries it to a private house to be weighed, and is tied up there until it be weighed, neither the horse nor yarn are distrainable for rent. In *Gisbourn* v. *Hurst* (*a*), where goods were delivered to a carrier to be conveyed, and he put them into a waggon, and left them in a private barn: it was decided, that they were privileged from distress, as they were delivered to a person exercising a public trade, to be carried or managed in the way of his employ; and that any man undertaking for hire to carry the goods of all persons indifferently, must be considered as a common carrier; for that the law has given the privilege in respect of the trader, and not in respect of the carrier. In *Trassell* v. *Morris* (*b*), it was determined, that an ox hide brought to *Leadenhall* to sell, could not be distrained *damage feasant*. In *Simpson* v. *Hartopp* (*c*), it was held, that a stocking frame was privileged from distress; and the general principle was there established, that all implements of trade are so privileged, if they be in actual use at the time, or if there be any other sufficient distress on the premises. That case was cited, and relied on by Mr. Justice *Buller*, in *Gorton* v. *Falkner* (*d*), where the Court made a distinction, and held looms to be distrainable, as they were not in actual use at the time the distress was taken, and there were no other goods upon the premises. [Mr. Justice *Richardson*.—That case is inapplicable to the present, as the articles were in use at the time of the distress, which was made for the rent of part of a house only.] A manufacturer is not obliged to accompany his goods in person, for the purpose of protecting them from distress, but the practice of trade is for him to send them either to a market, or to an agent, or factor, for the purposes of sale or exportation; and it would be productive of a most serious inconvenience to commerce in general, if the manu-

(*a*) 1 Salk. 249.———(*b*) Noy, 19.———(*c*) Willes, 512.———(*d*) 4 Term Rep. 563.

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facturer were obliged to travel with them himself. The cases of *Paterson* v. *Tash* (*a*), and *Newsom* v. *Thornton* (*b*), shew the nature of the power a factor has over goods deposited with him for sale; *viz.* that he is to be considered as acting in the capacity of a mere servant or agent, and cannot pledge the goods of his principal; and that even a bill of lading, which is an authority to receive the goods, cannot give the factor a greater power over them, than the possession of the goods themselves would do. In *Francis* v. *Wyatt* (*c*), it was stated in argument, that goods in the hands of a factor were within the general reason of exemption from distress, for the sake of public utility; and the whole force of that argument was admitted by *Blackstone,* the opposite counsel, in reply, and not dissented from by the Court. As well therefore, on the inconvenience and hardship which must necessarily follow, if the goods in question are held to be distrainable, as on principle and analogy to other decisions, it is sufficient to establish the proposition that such goods were protected, and the Court, in the exercise of their equitable jurisdiction, will not allow the plaintiff to be deprived of the benefit of such protection.

Mr. Serjt. *Lawes,* contrà, submitted that a verdict must be entered for the defendant. It is true that the question is new and important, as it embraces the point, whether goods in the hands of a factor generally, or under the particular circumstances as stated in this case, are exempted from the landlord's common law remedy by distress. It has been said, that if they were not, it would operate as an inconvenience both to the manufacturer and trader; but the claim of a landlord is equally important. The right given the latter at common law to recover his rent, is aided by subsequent statutes, and must be liberally construed. It is a general rule, that *primâ facie,* all moveable goods and chattels of the lessee may be distrained for rent due, if they are found upon the

(*a*) 2 Str. 1178.——(*b*) 6 East, 17.——(*c*) 3 Burr. 1503.

premises demised (*a*), and it is therefore incumbent on such lessee to shew the particular grounds of protection or exemption. In *Blackstone's Commentaries* (*b*), it is said, that "generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent; for otherwise a door would be open to infinite frauds upon the landlord; and the stranger has his remedy over by action on the case against the tenant, if by the tenant's default, the chattels are distrained, so that he cannot render them when called upon." In *Coke Littleton* (*c*), it is laid down, that "valuable things shall not be distrained for rent, for benefit and maintenance of trades, which by consequence are for the commonwealth, and are there by authority of law; as a horse in a smith's shop shall not be distrained for the rent issuing out of the shop; nor the horse, &c., in the hostry; nor materials in a weaver's shop for making of cloth; nor cloth or garments in a taylor's shop; nor sacks of corn, or meal in a mill, nor in a market; nor any thing distrained for damage feasant, for it is in the custody of law, and the like." So, here it has been said, that the bombazines were privileged in respect of trade; but the cases cited in aid of that proposition do not support it; the exception being as to goods delivered to a person exercising a public trade, to be carried, wrought, or managed in the way of his trade or employ; which is founded on expedience and necessity. Such exception does not extend to goods in the hands of a factor for sale, but is confined to the article while under the process or course of manufacture, as in *Read* v. *Burley*, where the taking yarn to be weighed, and bringing it back after it had been weighed, was part of the process of the trade. So, tools, wearing apparel, and beasts of the plough, are exempted; but even these are only privileged *sub modo*; for instance, tools or implements only whilst in actual use, and if there be no other goods on the premises to satisfy the

(*a*) Com. Dig. tit. Distress (B 1).——(*b*) Vol. iii. page 8.——(*c*) 47 (a).

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distress. The same rule holds with respect to beasts of the plough, which cannot be taken as a distress while sufficient goods remain on the premises without them; and this was stated to be in affirmance of the common law. So the exemption as to goods left with particular persons for specific purposes, is founded equally on reason and justice; and an authority is vested in them to hold such goods by way of necessity. A carrier is necessary for the conveyance of goods, and is bound to carry them safely; an innkeeper is required to receive a traveller as his guest; and a taylor may be compelled to work on the cloth furnished to him for that purpose (*a*); as it cannot be supposed that every person can make his own clothes; and the reason is, because credit is given to the article, and not to the person depositing it. In these cases, therefore, the deposits are not voluntary, but by act of necessity. So it is expedient that goods should be sent to a market to be sold; but here, there is no necessity whatever for the goods to be in the possession of a factor; their being so, is a voluntary act of the owner, and as they were merely deposited with him for sale, it was a matter of private compact only, and the business of a factor is neither public nor requisite. The plaintiff might have sold his goods in the place where they were manufactured, or might have accompanied them to *London* himself, and superintended the sale there; and if he seeks to dispose of them through the medium of a third person, he is liable to any risk that may attach to them during the time they are in the custody of such person. No greater hardship is imposed on him, than in the case of an under tenant, or person lending goods to another. The decision of the Court in *Francis* v. *Wyatt*, is in favor of the defendant, where a carriage was standing at a common livery stable, for the sake of convenience; and yet it was held to be distrainable for rent by the lessor of the premises; on the ground that it was part of the profits of the premises; and although Mr. *Clayton*, in the argument for the plaintiff in

(*a*) 22 Edw. 4. 49.

that case, stated that goods in the hands of a factor, were exempted from distress; yet, that *dictum* is only to be found in the report in *Burrow*, and is not even adverted to or mentioned in the same report of that case, by Sir *William Blackstone* (*a*), where the grounds of the decision of the Court were stated by Lord *Mansfield*, while in the former they are wholly omitted. That position, therefore, remains unsupported, and consequently cannot be entitled to any weight as an authority. Here too, the landlord could have no reason to suspect that the goods which he found on the premises did not belong to his tenant; and if they were sent to him for the purpose of sale, and he completely filled the ware-room with them, still the former would be deprived of his remedy by distress; but the factor received a commission for the sale, which must be considered as part of the profits which he derived from the occupation of the premises. In *Gorton* v. *Falkner* (*b*), the looms, for which the action was brought, were let, to be used in the course of trade; and therefore fell within the principle of exemption, as being in favor of trade and manufacture. Here, however, there was no deposit but for the bare purpose of sale. Several shop keepers buy and sell on commission, and are therefore in the situation of factors, but it would be too much to say, that goods found on their premises could not be distrained by the landlord for rent. Another reason why goods are protected from distress, while remaining in particular places, is, that they cannot be supposed to be in the possession of the occupier, as in a fair or market; but the bombazines in question were sent to the factor as in the nature of a private deposit, and were found on the premises at the time of the distress, and there was no indication whatever of their being the property of another, or that the tenant was not the actual owner of them. It was not necessary for the landlord to enquire whether the goods belonged to him, or to a third person, as they were found in his private ware-room; but if they had been deposited at a public wharf, or at a

(*a*) Vol. i. page 483.——(*b*) 4 Term Rep. 565.

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fair, he would have taken them at his peril:—besides, they were not in his custody for the purpose of manufacture, nor left in a public place at the time the distress was made: the law will therefore presume, that they were his property as tenant of the premises. Cattle sent to agist may be distrained for the rent of the land on which they are depastured, although they are going to market or a public place for sale (*a*). Here the bombazines were sent to the factor by private contract, and not for the exercise of any public trade, or to be wrought or manufactured by him in the course of such trade, and were therefore equally liable to distress as the carriage standing at livery, in the case of *Francis* v. *Wyatt*.

Mr. Serjt. *Marshall*, in reply.—With respect to agistment, it was determined in *Fowkes* v. *Joyce* (*b*), that if cattle, on their road to *London*, were depastured by the way, they might be distrained for the rent of the land where they were depastured; but in that case the plaintiff was afterwards relieved by the Court of Chancery (*c*), as there was found to be fraud on the part of the landlord; and he was ordered to pay costs: that rule, therefore, extends only to permanent agistment, and not to cattle going to a fair or market. In *Francis* v. *Wyatt*, it must be taken to have been admitted, that goods in the hands of a factor were privileged from distress, as the *dictum* to that effect was not afterwards contradicted, either by the opposite counsel, or the Court, and such goods were distinguished from a carriage standing at public livery. An inn-keeper derives a profit from the entertainment he affords to his guests, so as to be enabled to pay the landlord his rent of the premises, and has a right to detain the property of such guests until the amount of his bill be paid. It has been said that the exemption would be a great hardship imposed on landlords, if goods standing in the situation of the present were not liable to be distrained, and

(*a*) Com. Dig. tit. Distress, (B 1).——(*b*) 3 Lev. 260. S.C. 1 Vent. 50.
(*c*) See 2 Vern. 129.

that his rights have always been protected and favored by law; but a tenant may be a taylor, or weaver, and yet this will not vary the rule of law. Here, it is stated as a fact in the case, that *Milne* rented a ware-room and counting-house of the defendant: he therefore must have known that he was a factor, and that the goods found in such ware-room were the property of a third person, and left there for the purpose of sale.

Lord Chief Justice DALLAS.—The general right of a landlord to distrain is clearly protected by law, and I agree, that all chattels personal, which may be found on the premises, are *primâ facie* to be considered as belonging to the tenant. The rule for such presumption arises out of the relation of landlord and tenant, as well as from the nature of the thing itself. All rules of this description are simple in their origin, and therefore, in the first instance, a natural presumption was raised, that whatever might be found upon the premises demised, belonged to the occupier or lessee of such premises. In progress of time, however, exceptions were made to this rule; for cases frequently arise where, from change of circumstances, it becomes highly inconvenient to be confined strictly to a precise or general rule. These exceptions, as to the general right of distress, arose at a very early period, and have ever since been recognized by Courts of law. The question therefore is, whether the circumstances of the present case bring it within the general rule; or whether, either on principle or analogy, it may be considered as falling within one of the exceptions to it? It is necessary in the first instance, to consider the relation of landlord and tenant, and see the foundation of the general right of the former to distrain. It is not only just that a landlord may distrain goods of his tenant for the rent of his premises, but the rule on which such right is founded is altogether of artificial construction. Mr. Justice *Ashhurst*, before he was called to the Bench, in the course of his argument in the

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case of *Francis* v. *Wyatt* (*a*), ably observed, that "the right of landlords to distrain the property of a third person for rent due from their own tenants, is founded upon reasons of public convenience, and calculated for the prevention of fraud; and the exceptions out of the general rule are all of them tending to the benefit of trade and commerce, and general advantage;" and after he became a Judge, he said, in the case of *Gorton* v. *Falkner* (*b*), "It is a general principle, that all chattels found in a person's house are liable to be distrained by the landlord; it is true, indeed, that there are some exceptions to the general rule. The foundation of this principle is, that as the landlord is supposed to give credit to a visible stock on the premises, he ought to have recourse to every thing which he finds there." The rule, therefore, was founded on artificial arrangements for the sake of public convenience, and to prevent mischiefs which must otherwise necessarily have arisen; but as it was found that the adoption of this rule, if universally applied, would be productive of serious inconveniences, exceptions were introduced. One of these was in favor of trade and commerce, and as the landlord, on the one hand, is protected under the general right of distraining, so, on the other, goods of a certain description, and being in particular places, are equally protected in favor of trade and commerce. The only point, therefore, in the present case is, whether the goods in question fall within the latter description so as to be exempted from distress; or whether they come within the general rule, giving the landlord a power to distrain whatever goods he may find upon the premises? The exception was most clearly laid down by the Court in the case of *Gisbourn* v. *Hurst*, *viz.* "that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent (*c*)." That *dictum* was adopted by Lord Chief Justice *Willes*, in *Simp-*

(*a*) 3 Burr. 1500.——(*b*) 4 Term Rep. 568.——(*c*) 1 Salk. 250.

son v. *Hartopp*, who said (*a*), that "a horse in a smith's shop; materials sent to a weaver; or cloth to a taylor, to be made up, are privileged for the sake of trade and commerce, which could not be carried on, if such things, under these circumstances, could be distrained for rent due from the person in whose custody they are." So, Mr. Justice *Blackstone*, in his Commentaries, stated (*b*), that "Valuable things in the way of trade, shall not be liable to distress," and after enumerating the same description of articles as mentioned by Lord Chief Justice *Willes*, he observed "for all these are protected and privileged for the benefit of trade; and are supposed, in common presumption, not to belong to the owner of the house, but to his customers." That being the principle of the exception to the general rule, which was founded for public convenience, as being applicable to, and in furtherance of trade and commerce, let us see how it can be applied to the facts of this particular case. The plaintiff's goods were sent to his factor in *London*, and received by the latter in his character as such, to be either disposed of in the market, or exported; and yet, on the ground of public convenience, it has been asked, why did not the manufacturer sell them in the place where they were made? It is true that he might perhaps have done so; but the object for which they were sent was for the extension of trade; and it cannot be supposed for a moment that the commerce of the city of *London* is to be annihilated or narrowed by persons being obliged to dispose of the different articles manufactured by them on the spot; or that they should be compelled to come personally with them to *London*, and that if they do not, their goods will be subject to distress. The general principle is most clearly in favour of trade and commerce, as being consistent with public benefit and convenience, and it appears to me that the policy of the law applies more strongly in favor of a factor than in any other instance; and all the cases which have been decided

(*a*) Willes, 515.—— (*b*) 3 Blac. Com. page 8.

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on questions of this nature are consistent with the public advantage. The nature of the exception was thus laid down by Mr. Justice *Blackstone,* in his argument in *Francis* v. *Wyatt* (*a*), that "Where goods, &c. are privileged from necessity or public convenience; it is, where it would be quite impracticable or highly incommodious to dispose of or manufacture the goods at home." Would it not be both inconvenient and incommodious to the plaintiff, if he were obliged to have disposed of the bombazines manufactured by him at home? It would be directly contrary to the exception of the general rule, which was made in favour of trade and public convenience. It has been said, however, that this is a new case, still it must depend on general principle and analogy to those decisions where the distinctions have been taken as to what cases shall fall within the exception of distress, and what not. As to *Francis* v. *Wyatt,* it is unnecessary to say more than that there is no other instance to be found where a similar distress has been made or supported. In the argument in that case as reported in *Burrow,* it was expressly asserted, that goods in the hands of a factor, fell within the general reason of exemption from distress for the sake of public utility. That position was not attempted to be contradicted by Mr. *Blackstone,* then the counsel in opposition, nor adverted to by the Court. I am aware that in cases similar to the present, as to exceptions turning on nice distinctions, it is dangerous to lay down a rule on too broad grounds; and though the present does not seem to me to be distinguishable from the case of goods sent to a fair, wharf, or market, which have been held to fall within the exemption, I beg I may be considered as having strictly confined myself in the grounds of my opinion to goods in the hands of a factor, which I think are exempted from distress, as their being deposited with him is in favor of commerce and public convenience. In my judgment, therefore, the plaintiff is entitled to recover.

(*a*) 1 Sir Wm. Blac. 484.

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Mr. Justice PARK.—As it has been stated that this case embraces a question of novelty and importance, it may furnish an excuse for my adding a few observations to those which have fallen from my Lord Chief Justice, in the very luminous judgment he has just given. The general rule as to a landlord's right to distrain, is founded on the common law, and is perfectly well understood; but the exceptions to it are clearly stated by Lord *Coke*, and recognized by Lord Chief Justice *Willes* in *Simpson* v. *Hartopp*, where he states that "there were five sorts of things which at common law were not distrainable, three of which were absolutely free from distress, and could not be distrained, even though there were no other goods besides; and that the two others were only exempt *sub modo*, that is, upon a supposition that there is sufficient distress besides." Although, therefore, the rule for landlords to distrain is of most ancient origin, yet the exceptions to it appear to be equally so. The instances mentioned under the exception as to trade by Lord *Coke*, are not put as comprehending the whole exception, or limiting it to a particular class of articles, but merely by way of example or illustration. He states that "valuable things shall not be distrained for rent, for benefit and maintenance of trades, which by consequence are for the commonwealth, and are there by authority of law; as a horse in a smith's shop; nor materials in a weaver's shop for making cloth; nor corn in a market, for it is in custody of law, *and the like.*" But the principle on which this exception is founded, was most properly laid down by the Court in *Gisbourn* v. *Hurst*, for it was there resolved, that "goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, are for that time privileged from distress for rent, and that the law has given the privilege in respect of the trader, and not in respect of the individual." This, therefore, appears to me to furnish a complete answer to the argument for the defendant; for the bombazines in

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question were placed in the hands of a factor to be managed for the benefit of trade, and were either to be sold or exported by him. The doctrine laid down in *Read* v. *Burley* (*a*), is extremely strong to shew, that it is the trade which is favoured, and not the individual exercising it; still, however, it has been asked here, why did not the manufacturer come to *London* with the goods himself? It is impossible that he could do so consistently with his own interest. The character and business of a factor or broker is as well known in this metropolis, as any other trade. The case of *Fowkes* v. *Joyce*, as to cattle sent to agist, appears to me to be entirely out of the question, for the only point here is, whether the goods do not fall within the exemption in favor of trade and commerce. I am of opinion that they do, and although they were not delivered to the factor to be carried, yet they were placed in his hands to be managed by him.

Mr. Justice BURROUGH.—I am extremely happy to find that this case must be decided on principle, and not altogether governed by previous decisions. It has been said that the right of a landlord to distrain has been always protected by law and assisted by statute; but no statute has impeached the exceptions to such general right, which have existed from the earliest times, and appear to be as old as the law of distress itself, and have been universally adopted since mills have been used for the purpose of grinding corn, or the art of weaving cloth introduced. The question then is, whether this case falls within the principle of exception in favour of trade? In none of the decisions has any particular description of trades been specified, but the principle adopted has been, that where goods are sent to a third person for any certain specified purpose, they are, during that time, privileged from distress, for the advantage of trade in general. On reading the case of *Francis* v. *Wyatt*, as reported in *Burrow*, it appears to me that the Court were

(*a*) Cro. Eliz. 596.

satisfied that the case of a factor fell within the exemption there made in the course of the argument. It is not remarkable that *Blackstone* should not have noticed that position in his report of that case, for it appears that he argued it on the other side, and his mind might have been too much occupied to have allowed him to make full minutes; besides, his reports were not published by himself, but collated from his manuscripts after his death. The observation, therefore, might have fallen from *Clayton*, and it does not appear to have been contradicted either by *Blackstone* or the Court. The rule laid down in *Gisbourn* v. *Hurst*, appears to me not only to be particularly applicable to, but must govern the present, *viz.* that "the law has given the privilege in respect of the trader;" and that principle was fully admitted in *Francis* v. *Wyatt*. The business of factors has considerably increased within the last few years, so that commerce now could not well be carried on without their assistance: they are as much traders, and their business and occupation are equally as well known as those of an inn-keeper, weaver, or taylor. On these grounds therefore, I think the plaintiff is entitled to judgment.

Mr. Justice RICHARDSON.—The general right of a landlord to distrain for rent is of an extensive nature, and conferred on him as well by the common law as by statutes. By the former, such right has always been held liable to various exceptions, under one of which, it appears to me, the goods in question fall, *viz.* that where the goods of one man are put into the hands of another to be wrought, manufactured, or managed in the way of his trade, they are for that time protected from distress. The statutes of 2 *Wm. & Mary*,, *c.* 5. and 11 *Geo.* 2. *c.* 19, merely authorize landlords to distrain sheaves of corn and hay, or corn or grass growing, which were not previously distrainable at common law, and which do not affect the present question. Still, however, it has been said, that the exceptions from distress in favour of

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trade, are confined to cases where the goods are to be operated on, whilst here, they were only deposited for the purpose of sale. It is true that the rule of exemption has been generally so considered, as in the instances of corn to be ground, or cloth to be worked, but it is not necessarily limited to articles of that description, for goods are not delivered to a carrier to be operated on, but merely to be conveyed by him from place to place; and in *Gisbourn* v. *Hurst*, where the Court laid down the rule as applying to goods delivered to a person exercising a trade, to be carried, wrought, or managed, the goods were delivered to a carrier for the purpose of being conveyed by him. It is equally necessary for the advancement of trade, that goods should be placed with a factor for sale, as that they should be delivered to a carrier for conveyance. It has been urged, however, that a manufacturer ought to accompany his own goods to market in person, but if such an obligation were imposed on him it would be not only detrimental to commerce, but tend to narrow trade in general. Indeed, public utility requires quite the reverse; and it is for the advancement and extension of trade that goods are sent from the place in which they are manufactured, to a market where they are intended to be disposed of. Foreign goods, imported into this country, must be sold here through the medium of factors, and it would be most injurious if the manufactured produce of the importing country were liable to distress, for the private debt of the factor who is entrusted to sell them. This case therefore, appears to me to fall within the principle mentioned by Lord *Coke*, as to the exception of articles from distress in favour of trade, where his Lordship enumerated certain instances by way of example, and concluded by stating, that such exemption extended to articles of a like nature. I therefore think that this case falls expressly within the principle of that exception.

Judgment for the plaintiff.

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BISGOOD, Demandant; BRUTTON, Tenant; IVEE, Vouchee.

Tuesday, Nov. 15.

MR. Serjt. *Pell* moved that this recovery which had been suffered in the year 1784, might be amended, by describing the premises to be situate "in the parishes of *St. John*, in the city of *Exeter*, and *St. David*, in the county of the same city," they having been stated in the exemplification, as situate in the parishes of "*St. John* and *St. David*, in the city of *Exeter*." In the deed to lead the uses, the description was three fields, containing 18 acres, in the parish of *St. David*, in the county of the city of *Exeter*, and two messuages in the parish of *St. John*, within the city of *Exeter*. It appeared that those parishes form two distinct districts, *St. John*'s being within the ancient walls of the city, and *St. David*'s without them, and forming part of the county of the said city. He produced an affidavit to shew that the possession had gone with the lands since the recovery was suffered; on which

A recovery may be amended by describing the premises to be situate "in the parish of *A.* in the city of *B.* and in the parish of *C.* in the county of the same city," according to the deed to lead the uses: although they were described in the exemplification of the recovery, as being situate in "the parishes of *A.* and *C.* in the city of *B.*"

The Court allowed the amendment to be made, as prayed for; and they observed, that in future they should always require an affidavit to be made when a fine or recovery was moved to be amended, that the possession had been in conformity to and followed the deed, since such fine or recovery was levied or suffered.

Fiat (*a*).

On motion to amend a fine or recovery, an affidavit must be produced, stating that the possession had followed such instruments.

(*a*) HILL, Vouchee.

MR. Serjt. *Heywood*, on a former day in this Term, moved that this recovery, which was suffered in 1792, might be amended, by inserting the words "the county of the" before those of "city of *Coventry*," on an affidavit, which stated that the premises intended to pass were situate in the county of that city, and so described in the deed to lead the uses, but that by mistake they were described in the recovery as being in the city of *Coventry*. He produced an affidavit, shewing that the possession of the premises had followed the recovery; and the Court

Allowed the amendment.

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Wednesday, Nov. 14.

PARK *v.* TORRE.

On a motion for an attachment against the Warden of the Fleet, for not bringing a defendant into Court under a writ of *habeas corpus*, one of his officers swore that the defendant had the benefit of the rules, but that he could not be found until after the time for bringing him into Court had expired, when he was confined within the prison until he was discharged under an order of the Insolvent Debtors' Court:—The rule for the attachment was ordered to be discharged, on the Warden's paying the costs of the application.

MR. Serjt. *Vaughan*, on a former day in this Term, obtained a rule *nisi*, that an attachment of contempt might issue against the Warden of the Fleet, for not having brought the body of the defendant into Court, pursuant to a writ of *habeas corpus ad satisfaciendum* issued against him in this cause. He founded his motion on affidavits which stated that the defendant was arrested at the suit of the plaintiff in this action, and afterwards committed to the custody of the Warden, on a *habeas corpus*; that final judgment having been obtained for 87*l.* 9*s.* 10*d.* a writ of *habeas corpus* was sued out by the plaintiff on the 6th *July* last, directed to the Warden, commanding him to have the body of the defendant before this Court on *Tuesday* next after three weeks of the Holy Trinity, in *Trinity* Term last, to satisfy the plaintiff the damages and costs recovered against the defendant on the judgment; that the writ was delivered to the Warden on that day, or his deputy at the Fleet Prison; that the former acknowledged that the defendant was in his custody and took the usual fee for returning the writ; that the record of the judgment was brought into Court on the 10th *July*, being the return of the writ, for the purpose of charging the defendant in execution at the suit of the plaintiff upon that judgment; and that the tipstaff was paid the usual fees for bringing him up; that the Warden did not bring him into Court, but requested to be allowed until the following day for that purpose; but that he did not then do so, in consequence of which, the defendant could not be charged in execution on the judgment; that the Warden had twice told the plaintiff's attorney that he had granted the defendant the rules of the prison and had taken security for his keeping the same; and that he had been prevented obeying the writ by reason of his officers' not being

able to find the defendant within the rules, or elsewhere, from the time he received the same, until after the rising of the Court on the last day of the last *Trinity* Term.

The learned Serjeant contended that the Warden was equally liable as a sheriff, gaoler, or other officer, to an attachment for not obeying a writ of *habeas corpus* (the party being in his custody), and more particularly so, as in case it was enforced, he would have his remedy against the defendant's sureties, for a breach of the condition of their bond.

Mr. Serjt. *Blosset* was about to shew cause in the first instance, but the Court seemed to doubt whether the plaintiff's remedy was by this summary mode of application, or by action. He now did so on an affidavit of an officer of the prison, who stated that he had duly received the writ of *habeas corpus*, and that in consequence, he repeatedly sent one of the turnkays to the defendant's lodgings, who resided within the rules, for the purpose of his obeying the writ; but that notwithstanding every possible exertion, he was not able to see the defendant until late in the afternoon of the last day of the last Term, when it was too late to bring him before the Court; that he was immediately deprived of the benefit of the rules, and confined within the walls of the prison, where he continued a prisoner at the suit of the plaintiff, until he was discharged under an order of the Insolvent Debtor's Court, as well from this action, as all other debts on which he was detained in custody. The learned Serjeant submitted, that it did not appear on the face of the affidavit that the defendant had ever been out of the rules; even if he had, it would only be in the nature of an escape on *mesne* process, and the plaintiff having received no actual loss, he could only be entitled to recover nominal damages. The privilege of the rules of the Fleet Prison were authorised by the Court, and a prisoner within them might be considered as much in the custody of the Warden, as if he were confined within the walls of the prison. This is not in the

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nature of an escape, nor would an attachment lie against a sheriff for not bringing in the body, under circumstances similar to those in the present action; for an action for an escape must be brought before the return of a defendant into custody, and here he was in such custody on the last day of the last *Trinity* Term, and so continued until he was duly discharged, under an order of the Insolvent Debtors' Court. It is true, that if a sheriff return *non est inventus*, where he has or might have taken the defendant, he is liable to an action for a false return; and if he return *cepi corpus, et paratum habeo*, where he has taken the defendant, *and let him go at large without bail*, he is liable to an action, if the defendant be not in custody, or bail above be not put in and perfected, at the return of the writ (*a*). So, after the defendant has surrendered, an attachment against the sheriff for not bringing in the body, is irregular, though the surrender be not made until after the rule for bringing in the body has expired. *Rex* v. *The Sheriff of Middlesex* (*b*). The plaintiff therefore, can have no remedy against the Warden for the amount of the debt due to him from the defendant; and as the former has not in point of strictness, obeyed his directions under the writ, he can only be deemed liable to the costs of the present application.

Mr. Serjt. *Vaughan*, in support of the rule.—It having been admitted that the Warden has in point of strictness been remiss, the plaintiff has a right to recover the amount of his debt. Although the rules of the Fleet Prison may be authorised and regulated by the Court, still, a defendant residing within them must be considered as much in custody as if he were confined within the walls. It is discretionary in the Warden to grant the indulgence of the rules to a prisoner, and he requires sufficient security for so doing. The only question therefore in this case, is between him and the defendant's sureties. It must be presumed that the defendant was

(*a*) See 1 Tidd, 7th edit. 331.——(*b*) 2 Mahl. & Selw. 562.

not within the rules during the last Term, as he could not be found till the last day of it. That, therefore, was a contempt for which an attachment might issue. The cases cited as to the liability of a sheriff are inapplicable, as here the defendant was to be brought up to be charged in execution;—and if a sheriff neglect to bring up a party on a *habeas corpus*, an attachment may immediately issue against him. In *Hopman* v. *Barber* (*a*), on a motion against the Warden of the Fleet, it was held, that if a *habeas corpus* is brought, he must obey it, though the party refuses to pay his fees; as he has a remedy for them. Although that case is loosely reported, it must be inferred that the motion was for an attachment. As therefore, it is discretionary in the Warden to grant the indulgence of the rules, on taking sufficient sureties to indemnify himself, and as no distinction can be drawn in cases of *arcta custodia* on such rules, or between the Warden, gaoler, or sheriff, this is like the ordinary case where a party is to be brought up under a writ of *habeas corpus* to be charged in execution.

Lord Chief Justice DALLAS.—The Warden of the Fleet was unquestionably bound to obey the writ of *habeas corpus*, or state a satisfactory reason to the Court for not having done so. Strictly speaking, the cause assigned for his not bringing the defendant into Court, does not amount to a sufficient excuse, for it is merely sworn by one of his officers that he received the writ, and in consequence thereof, sent one of the turnkeys repeatedly to the defendant's lodgings; and that he was not to be found there. The turnkey however, has made no affidavit as to the diligence he used on those occasions. If the defendant was not to be found in the first instance, he should have increased his exertions. The only question then is, as to the result of the present application. An intentional contempt on the part of the Warden cannot be surmised;—but he was bound to obey the writ. Although

(*a*) 2 Stra. 814.

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the defendant might not have been within the rules, still, he was taken into custody on the last day of the last Term, and detained within the walls of the prison, until he was duly discharged by virtue of an order of the Insolvent Debtors' Court. The plaintiff, in point of fact, has sustained no injury from such neglect. It would be therefore too much to put him in a better situation than that in which he before stood; but the Court will impose on the Warden the payment of the costs attending the present application; and on those terms the rule must be

Discharged.

Wednesday, Nov. 14.

TAYLOR *v.* RUTHERMAN.

If a defendant be arrested by the initials of his christian name only, and sign a bail-bond in a similar manner; the Court will discharge him on entering a common appearance, on his undertaking to bring no action.

MR. Serjt. *Taddy*, on a former day in this Term, obtained a rule *nisi*, that the bail-bond which had been given in this cause, might be delivered up to be cancelled, and the defendant discharged on entering a common appearance, he having been arrested on a *capias* by the name of *H. Ruthermán*, and signed the bail-bond in the like manner, the whole of his christian name not having been set out at length in either of those instruments.

Mr. Serjt. *Vaughan* was on this day about to shew cause, when

Mr. Serjt. *Taddy* referred to the case of *Reynolds* v. *Hankin* (*a*), as being precisely in point; where the defendant was arrested by the name of *F. W. Hankin*, and described in a similar manner in the affidavit to hold to bail; and the Court of King's Bench held, that an arrest of a party by the initials of his christian name only, was irregular. He observed, that the only distinction here was,

(*a*) 4 Barn. & Ald. 536.

whether the defendant having signed the bail-bond in the same manner as he was described in the writ, he had thereby waived the irregularity; and observed that he had been compelled to do so in order to obtain his discharge out of custody.

The Court being of opinion that the bail-bond was given by the defendant under *duress*, and as there was nothing to amend by, they made the rule absolute, on the defendant's undertaking to bring no action (*a*).

(*a*) But see *Howell* v. *Coleman*, 2 Bos. & Pul. 466. *Kingston* v. *Llewellyn*, ante, vol. iv. 317, *contra*.

HOOKHAM *v.* ANN CHAMBERS.

Wednesday, Nov. 14.

A *feme covert* on being arrested, was discharged on filing common bail, though separated from her husband by a divorce *à mensâ et thoro*, she having appealed against the sentence of divorce, which appeal was pending at the time she was arrested.

MR. Serjt. *Hullock*, on the first day of this Term, obtained a rule *nisi*, that the bail-bond which had been given in this cause, might be delivered up to be cancelled, and the defendant allowed to file a common appearance, on the ground that she was a *feme covert* at the time the cause of action arose, and continued so when she was arrested.

Mr. Serjt. *Peake* now shewed cause, on an affidavit, which stated that she was married to one *Henry Chambers* in the year 1784, and that in 1813 he obtained a divorce in the Consistory Court, *à mensâ et thoro*, but it appeared that she had appealed against it, and that such appeal was still pending; it was also sworn, that the plaintiff knew how she was situated at the time of the arrest. The learned Serjeant observed that the only question was, whether she was sueable as a single woman; and that the cases which had been decided as to where there had been a separation between husband and wife by mutual consent,

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were entirely out of the question. In *Comyn's Digest* (*a*), it is stated that in an action by husband and wife, it may be pleaded, that there was a divorce between them, and so that she was not his wife; and it seems that such plea may be pleaded in general terms, without assigning any cause of divorce. In Lady *Belknap's case* (*b*), she was allowed to sue out a writ in her own name, her husband being banished during the king's pleasure, and not abjured the realm. In *Stevens* v. *Tot* (*c*), it was decided that if a wife be divorced *à mensâ et thoro*, she may nevertheless sue alone without her husband, as if he were in exile. The same rule holds as against the wife, and therefore the defendant in this case may be impleaded as a *feme sole*. In *Sparrow* v. *Carruthers* (*d*), where the husband had been transported for seven years, before the expiration of which, the wife contracted a debt, and was sued for it, Mr. Justice *Yates* thought that the transportation suspended the disability of the wife, and that she might be sued as a *feme sole*. And in the case of *De Gaillon* v. *L'Aigle* (*e*), it was held, that the wife might acquire a separate character by her husband's residing abroad. Or by his deserting the kingdom; *Walford* v. *De Pienne* (*f*). So, in *Hopewell* v. *De Pinna* (*g*), which was an action on a promissory note, and the defendant pleaded coverture, and it appeared that her husband went abroad twelve years ago; it was held, that she was bound to prove that her husband was alive within seven years, and letters which he had written being produced, to shew that he was, the defendant had a verdict. These cases have established the principle, that where husband and wife are separated by legal authority, so that as the former is not answerable for her debts, or amenable at law for her misconduct, or any other acts, whether the divorce be permanent or temporary, she may be sued as a *feme sole*. Here it is quite clear, that the husband could

(*a*) Tit. Abatement (E. 6.)——(*b*) 2 *Hen.* 4. fol. 7. (a.) S. C. Co. Lit. 132 b.——(*c*) Moore, 665.——(*d*) 2 Sir Wm. Blac. 1197, (n.) S. C. 1 Term Rep. 6, (n.)—— (*e*) 1 Bos. & Pul. 357. ——(*f*) 2 Esp. Rep. 554.——(*g*) 2 Camp. 113.

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not be sued, as he was bound to allow his wife alimony on account of the divorce.

Mr. Serjt. *Hullock*, in support of the rule relied on the case of *Marshall* v. *Rutton* (*a*), as having impugned the authority of all the previous decisions on this subject; and where it was clearly established, that a *feme covert* cannot bring an action, or be impleaded as a *feme sole*, notwithstanding she lives separately from her husband, and has a separate maintenance secured to her by deed. He also referred to *Pritchett* v. *Cross* (*b*), where a married woman being arrested for penalties on the lottery act, was discharged by the Court on entering a common appearance, on her making an affidavit of her coverture.

The Court held, that these authorities were decisive; and as the appeal against the divorce was still pending, it had the effect of suspending the sentence of the Ecclesiastical Court; and that the special circumstances in this case did not distinguish it from the general principle which had been established by the decision in *Marshall* v. *Rutton*; and they consequently ordered the rule to be made

Absolute.

(*a*) 8 Term Rep. 545.——(*b*) 2 Hen. Blac. 17.

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Friday, Nov. 16.

DOE, on the demise of AZARIUS PENWARDEN *v.* JOHN GILBERT and NATHANIEL GILBERT.

A testatrix, as for her temporal estates and effects, gave and disposed of the same in the manner following, *viz.* she bequeathed to *L. C.* 4*l.* and to *M. H.* 3*l.* which legacies she directed to be paid by her executor within three months after her decease; also she gave, devised, and bequeathed to *J. G.* all her lands, tenements, and hereditaments, particularly those called *B.* and *C.* situate in *P.* which were lately the lands of her husband, and all the rest and residue of her goods and chattels, personal and testamentary estate and effects whatsoever, she gave and bequeathed to the said *J. G.* whom she appointed sole executor of her will:—Held, that *J. G.* took a fee in the lands of *B.* and *C.* it being the intention of the testatrix, as collected from the will, to dispose of all her property; and that the words "testamentary estate," in the residnary clause, connected with those of "temporal estates" in the introductory clause, were sufficient to convey such an estate, although the clause devising the lands, would give him an estate for life only.

THIS was an action of ejectment brought by *Azarius Penwarden*, as heir at law of *Agnes Hatherly*, to recover the possession of two tenements called *Bromehills* and *Blackhills*, in the parish of *Pancraswicke*, in the county of *Devon*, in the possession of the defendants, as devisees under the will of their father *John Gilbert*.

At the trial of the cause before Mr. Justice *Holroyd*, at *Exeter*, at the last *Lent* Assizes, a verdict was taken for the plaintiff, subject to the opinion of the Court on the construction of the following will; which was duly executed and attested to pass real estates:—"In the name of God, Amen. I, *Agnes Hatherly*, of the parish of *Pancraswicke*, in the county of *Devon*, widow, do make this my last will and testament, in manner and form following:—First, I resign my soul to God, &c.; and as for my temporal estates and effects, I give and dispose of the same in manner and form following; that is to say, I give and bequeath unto *Lydia Casely*, the sum of 4*l.*; also I give and bequeath unto *Mary Hatherly*, of the parish of *Bridgerule*, widow, 3*l.*; which with the last legacy, I order and direct to be paid by my executor within three months after my decease:—Also, I give, devise and bequeath unto *John Gilbert*, of *Pancraswicke* aforesaid, all my lands, tenements and hereditaments, with their and every of their appurtenances, and particularly those commonly called and known by the name of *Bromehills* and *Blackhills*, situate, lying and being in *Pancraswicke* aforesaid, and which were lately the lands of inheritance of my deceased

husband *William Hatherly*;—and all the rest and residue of my goods and chattels, personal and testamentary estate and effects whatsoever, I give and bequeath unto the said *John Gilbert*, whom I make whole and sole executor of this my last will and testament. In witness, &c."

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In case a life interest only passed to *John Gilbert*, by the above will of *Agnes Hatherly*, then the verdict for the plaintiff was to stand; but if the fee passed under the will, then it was admitted that the defendants were in the lawful possession of the property, and a verdict was to be entered for them.

The case now came on for argument, when

Mr. Serjt. *Bosanquet*, for the plaintiff, submitted, that *John Gilbert*, the devisee, took only an estate for life, there being no words of limitation contained in the will, nor any others equivalent to the word "estate," so as to pass the inheritance. The only question is, whether the residuary clause, as connected with the introductory words, can be construed so as to shew that it was the intention of the testatrix that an estate in fee should pass. From the language of the whole of the will, it must be taken that she knew the meaning of technical terms; for the words "give and bequeath" are used by her in the beginning of it, as being applicable to the legacies; and the same words are adopted in the residuary clause, which therefore can only apply to the personal estate, although the words "effects whatsoever," are there introduced; for the word "effects," *primâ facie*, is applicable to personal property only, and does not affect real estate; and more particularly so, where it is coupled with goods and chattels. It must be admitted that the bequest of the testamentary estate in that clause is in itself equivocal, but as it is connected with the personal estate, it clearly shews that it was the intention of the testatrix to confine it to that alone. Her object was to give to her ex-

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ecutor the beneficial interest in whatever property might come to him, to be administered in his character as such; and that after the payment of the two legacies in question, he should be entitled to the residue. If the executor was only to take under the residuary clause, it is perfectly clear, that none of the real property would pass to him. The words of the introductory clause are not so strong as in several cases, where it has been determined, that a fee would not pass; for as Lord *Hardwicke* very properly observed, "intent is one thing, and execution another." If words in such a clause are applicable to real and personal property, they must be confined to the latter, so as not to prejudice the heir at law. In *Shaw* v. *Bull* (*a*), where *A.* being seised in fee of five messuages, devised two of them to his wife for life, remainder to his two daughters in fee, and devised the third to the wife and her heirs; he also devised the fourth to his wife and her heirs, she paying his legacies in case his goods did not answer them all; and if she did not make provision for the payment of his legacies in her life-time, that it should be lawful for the legatee, after her death, to sell the said messuage to satisfy the legacies out of the value thereof; and all the overplus of his estate was to be at his wife's disposal, whom he made his executrix; it was held, that the last house did not pass; and the Court there held, that making a person executor, and giving the overplus of the estate, gives only the personal estate; and Lord Chief Justice *Trevor* said (*b*), "In the construction of wills generally, the words 'my estate,' 'the residue of my estate,' or 'the overplus of my estate,' may well pass an inheritance, where the intent is apparent to pass it. But such intent to carry an inheritance by such words, must be very apparent, and necessary to be drawn from the words of the will, and circumstances of the case; for if the words be indifferent to real and personal estate, or may be applied to personal alone, there the heir at law

(*a*) 12 Mod. 593.——(*b*) Id. 595.

is not to be disinherited by the implication of such words, or by any implication at all, but what is a necessary one;" and it was also there decided, that if words which of themselves would disinherit an heir at law, be joined with others which make them less forcible, they shall be construed for his benefit. [Mr. Justice *Park*.—In *Barnes* v. *Patch* (*a*), it appears that the Master of the Rolls doubted the position of Lord *Trevor* in that case, where he said, that "'my estate,' 'the residue of my estate,' or 'the overplus of my estate,' may well pass an inheritance, where the intent is apparent to pass it;" for his Honor there observed, that "the doctrine of modern cases is, that where there is nothing to qualify the word 'estate', it will carry real as well as personal estate, and the contrary intention ought to appear to induce the Court to put upon that word a less extensive signification than it naturally bears."] The word "estates" in the introductory clause, must be restrained to things *ejusdem generis*, with which it is coupled and associated; and here, it was accompanied with the word "effects," which must be deemed to apply to personal estate only. So, the word "estate" in the residuary clause is not sufficient to pass a fee, as it is coupled with the residue of the goods and personal estate of the testatrix. In *Timewell* v. *Perkins* (*b*), where the devise was in the following terms, *viz.* "All those my freehold lands and hop grounds, with the messuages, &c. now in the tenure of *L.* and all other the rest, residue and remainder of my estate, consisting in ready money, plate, jewels, leases, judgments, mortgages, &c.; or in any other thing whatsoever or wheresoever, I give to *A. B.* and her assigns for ever;" Mr. Justice *Fortescue* said (*c*), that "the word 'estate,' was expressly confined to personals, as plate, jewels, judgments, mortgages, &c. which are all personal estate, and therefore he thought that the residue of the testator's real estate did not pass; but that supposing it would admit of a doubt, yet certainly the heir

(*a*) 8 Ves. 608.——(*b*) 2 Atk. 102.——(*c*) Id. 103.

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at law ought to be preferred, unless the intention of the testator to exclude him, appeared exceeding plain." In *Doe*, d. *Spearing* v. *Buckner* (*a*), it was held, that words in the introductory clause of a will, enumerating property as meant to be devised, were not of themselves sufficient to dispose of a fee, unless there were subsequent words in the will to carry the intent of the testator into execution; although they may have some effect in the construction of the will. There the introductory words were far stronger than here, for the will commenced thus:—" As to my estate and effects *both real* and personal, I give and dispose as follows:" The testator then gave the sum of 4000*l.* to trustees, upon trust; and then by the residuary clause, gave " all the rest, residue and remainder of his estate and effects of any and what nature or kind soever or wheresoever, to the trustees, their executors or administrators, in trust from time to time to add the interest thereof to the principal, so as to accumulate the same; it being his will that the residue should not be paid or payable, but at the time and in the manner, and to the several persons, as the principal sum of 4000*l.* had been directed to be paid;" and it was determined, that the testator's freehold property did not pass under the will; but went to the heir at law; the terms in the clause being wholly inapplicable to real estate, and notwithstanding there were general words in the introductory clause as to all the testator's estate and effects, both real and personal; and Lord *Kenyon* there said, in delivering the judgment of the Court (*b*), " It is our duty to give effect to the intention of the testator, if that can be discovered; but if we cannot find out that intent, the title of the heir at law must prevail. I do not see any words in the will to disinherit the heir at law. The testator set out in the beginning of his will as if he had intended to dispose of all his property; but though those general words would have shewn his intention if there had been subsequent words in the will to

(*a*) 6 Term Rep. 610.——(*b*) Id. 612.

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carry that intent into execution, as was held by Lord *Talbot* in *Ibbetson* v. *Beckwith* (*a*), it has been held in a variety of cases; that alone they are not sufficient to dispose of a fee. And by adverting to the residuary clause, there are no words to pass the estate in question. Seeing therefore, that there is nothing in the residuary clause to pass this estate, and that there is nothing in the will to make it necessary for the trustees to take it to perform any trust in them, the heir at law stands entrenched in his right as heir, and cannot be removed from it." That case is particularly applicable to the present; and there both the introductory and residuary clauses were infinitely stronger than in this; as the word "real" was not used in either; but the word "estate" was coupled with personal effects only. The devise as to the lands, is express, and conveys but an estate for life, as no words of inheritance are attached to it; and it must be presumed that the testatrix intended to give thereby all the interest which the devisee was to take in the lands in question; and it is a well known rule, that an estate which is given in express terms, cannot be enlarged by implication, unless such implication be necessary to further the manifest intention of the testator, as expressed in his will. It cannot be supposed that the testatrix meant to give a larger estate in the lands by the residuary clause than she had given in that immediately preceding it, under which she used the word "devise," as being applicable to real property, and the interest which the devisee was to take therein. It may be contended however, that as she has adopted the word "testamentary" in the residuary clause, it may have the effect of conveying an estate in fee; but that word must be taken to apply to such property only as might be administered under the will. Although in *Smith* v. *Coffin* (*b*), where *A.* by his will, reciting, "as to such worldly estate as God had pleased to bless him with," made a provision for his heir at law, and devised "all the rest and residue of his goods, chattels, rights,

(*a*) Cas. temp. Talb. 157.——(*b*) 2 Hen. Blac. 444.

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credits, personal and *testamentary estate* whatsoever, to *B.* for his own use, benefit, and disposal;" it was decided, that under such clause, *B.* took an estate in fee in the lands of the testator; still that case has carried the doctrine on this subject too far, and has seldom, if ever been referred to as an authority; nor been adverted to by text writers, as such (*a*). There, however, the testator made a provision for his heir at law, which was chargeable out of his residuary estate, and there was no previous disposition of the lands by any clause in the will; and Mr. Justice *Buller* there said (*b*), that "the testator meant to devise all his property; that the word 'testamentary' is as well applicable to real as to personal estate; and if it were not applied to the real property, it is merely tautologous; and in construing wills, the Court will, if possible, give a meaning to every word." The determination in that case, therefore, turned entirely on the intention of the testator, and cannot govern the present; besides, there the executrix was not appointed in the same clause, as here, and the messuage devised to her formed no question in the cause. Here, however, on looking at the residuary clause, it is perfectly clear that the testatrix did not intend to give a larger interest to the devisee than he would take as legatee, or executor, and more especially as the testatrix had expressly stated what interest he was to take in the lands in question, by the clause immediately preceding it. At all events, the words "testamentary estate and effects," cannot be applied to the interest the devisee was to take in the real estate, but only to the disposition of the personal property, which might be given to him by the Ecclesiastical Court, after he had proved the will; for a devise is founded on different principles, and governed by different rules from a testament, which is only an instrument to convey personal property (*c*). So, the words "temporal estates" in the introductory clause, can refer

(*a*) But see Cruise's Dig. vol. 6. 2d edit. page 270.——(*b*) 2 Hen. Blac. 450.——(*c*) See Cowp. 305.

only to spiritual effects. In *Denn*, d. *Moot* v. *Mellor* (*a*), where the residuary clause was in these terms, *viz.* "all the rest of my lands, tenements, and hereditaments, either freehold or copyhold, and also all my goods, &c. after payment of my just debts and funeral expences, I give and bequeath the same to *A.* whom I appoint my sole executrix;" it was held, that she only took an estate for life; and in *Doe*, d. *Small* v. *Allen* (*b*), where a testator, as to what real and personal estate it had pleased God to bless him with (all his debts, &c. being first paid out of his personal, and if that was not sufficient, out of his real estate), he devised all his messuages, lands, tenements, and hereditaments in *S.* &c. to *A.*; it was held, that *A.* took only a life estate. From those cases therefore, it is clear that an estate for life only passed to the devisee by the clause in the will under which the lands in question were conveyed to him; and the residuary clause which follows, does not give him a greater interest therein. [Lord Chief Justice *Dallas*.—Those two latter cases do not appear to me to furnish any rule by which we are to be guided in deciding the present, as it depends on the construction of the word "testamentary," which has been introduced in the residuary clause of the will; and the only question is, whether that clause, as coupled with the introductory words, indicates an intention in the testatrix, that it should be considered as applicable to both her real and personal estate, or whether it should be confined to the latter only.]

Mr. Serjt. *Taddy, contrà.* *John Gilbert*, the devisee, took an estate in fee under the will of the testatrix; and the defendants are therefore entitled to retain the possession of the property in question. It is manifest as well from the introductory words, as from the whole of the will, that she meant that none of her property should remain undisposed

(*a*) 5 Term Rep. 558. S. C. 1 Bos. & Pul. 558. 2 Bos. & Pul. in Error, 247.——(*b*) 8 Term Rep. 497.

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of. She directed the devisee to pay legacies within a limited time, and as she contemplated her real estate when she used the words "temporal estates" in the first devise, it is evident that she wished the words "testamentary estate" to include her real estate in the last; and the word "estate" or "estates" standing singly in a devise, will pass the fee-simple, unless it is accompanied by words implying a contrary meaning, and sufficiently strong to controul it. Although in *Denn*, d. *Gaskin* v. *Gaskin* (*a*), it was determined, that where there are no words giving an inheritance, or plain indication on the face of the will for inferring an intention in the testator so to do, the devisee takes only an estate for life; still, a testator's intention must be collected from the words he has used, and not from conjecture; and if there be sufficient to shew in a subsequent part of a will, that he meant that a larger estate was to be conveyed, it must pass accordingly. It is equally true, that a fee will not pass by force of the word "hereditaments" alone. So the word "effects" *per se*, carries nothing beyond the personalty, and although the words "wheresoever and whatsoever," or "of what nature or kind soever," follow that word, they are not sufficient without other aid from the context, to bring real estate within the descriptive force of the term. Here, however, the intention of the testatrix, from the manner of her expressions throughout the whole of the will, must be looked at; and the question is, whether the words "all the rest and residue of my personal and testamentary estate and effects," used in the residuary clause, contained such an express devise to the devisee, as will exclude the heir at law, and as was truly observed by Mr. Justice *Buller* in *Smith* v. *Coffin*, "If the word 'testamentary' be not applied to the real property, it is merely tautologous," and will be of no avail whatever; and he also observed, that "In construing wills, the Court, will if possible, give a meaning to every word." It has been said that the word "testamentary"

(*a*) Cowp. 657.

must be confined to personalty only; but on reference to the statutes of wills (*a*), it appears to be equally applicable to a devise of lands, for both these statutes adopt the terms *will* and *testament* as being synonymous, as they empowered any person to dispose of his lands by his *last will and testament* in writing. The word "testamentary," therefore, has the effect of including all such property as would pass by a will or testament under those statutes; and here the testatrix has used the words "personal and testamentary estate," as shewing her intention to dispose of her real as well as her personal property. The construction put by the Court as to the meaning of the word "testamentary," in the case of *Smith* v. *Coffin*, is expressly in point, and the authority of that case has never been impeached or doubted. Independently of that, however, the devisee must take an estate in fee, for he was directed, as executor, to pay legacies within three months after the decease of the testatrix; and the real estate might have been chargeable for that purpose. The judgment of the Court in *Denn*, d. *Mellor* v. *Moor* (*b*), is in point for the defendants, where the testator devised all the rest of his lands, tenements, and hereditaments to his wife, *after payment of his just debts and funeral expences*, and appointed her his executrix; it was held, that she took a fee in the testator's lands: and although the judgment in that case was reversed in the House of Lords (*c*) yet Chief Baron *Macdonald*, in delivering the opinion of the Judges, there said (*d*), "It is clearly settled in a variety of cases, that if one devise his estate to another, paying his debts, or he paying his debts, or, paying a sum in gross, a fee must necessarily pass, because as the devisee is to pay the debts or money in all events, and his interest may cease before he is re-paid out of the estate if it be only an estate for life, he may be a loser, which the testator cannot be supposed to have intended. So, if an annual payment by the devisee to

(*a*) 32 *Hen.* 8. *c.* 1. 34 & 35 *Hen.* 8. *c.* 5.——(*b*) 1 Bos. & Pul. 562.
(*c*) See *Moor* v. *Denn*, d. *Meller*, 2 Bos. & Pul. 247.——(*d*) Id. 250.

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another person, be directed by the will to continue during the life of such other person, as the devisee may be a loser if he do not survive that person, an intent is from thence collected that he is to take a fee." Here, the lands were given absolutely to the devisee, as well as the whole of the personal property of the testatrix. It has been contended, however, that the lands were specifically devised, and in terms which passed an estate for life only; but the residuary clause includes all the property of the testatrix which was not before properly conveyed, and consequently, the reversion passed under that clause, although an estate for life might only have passed under the terms of the former. The position laid down by Lord *Trevor*, where he stated, that "the surplus of my estate might pass the estate," was doubted in *Barnes* v. *Patch*; but that case is inapplicable to the present; and in *Chichester* v. *Oxendon* (*a*), it was held, that a devise of all my estate of *Ashton*, passed a fee-simple, as being descriptive of the interest devised, and not merely of the situation of the land. The cases of *Timewell* v. *Perkins*, and *Doe*, d. *Spearing* v. *Buckner*, turned entirely on the construction of the particular clauses in the wills, neither of which were similar in terms to the present, and therefore those cases do not apply. In the former, the testator explained his own meaning of the word "estate" in the residuary clause, by shewing of what he understood it to consist, *viz.* "in personal things only, as ready money, plate, jewels, &c. or in any other thing whatsoever;" which was properly decided to be confined to personals only, and would not have the effect of conveying the testator's real estate; and, in the latter case, the residue of the testator's estate was given to trustees, their executors and administrators, to add the interest to the principal, so as to accumulate the same; and as Lord *Kenyon* observed (*b*), "the interest and principal were to make one consolidated sum of the same nature: but that these were terms wholly inapplicable to a real estate."

(*a*) 4 Taunt. 176.——(*a*) 6 Term Rep. 613.

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It has been said, that here the devisee was appointed sole executor in the same clause in which the residuary estate was bequeathed to him. That circumstance, however, is immaterial. In *Hogan*, d. *Wallis* v. *Jackson* (*a*), it was decided, that if the words used in a devising part of a will, though not proper and technical, are yet sufficient to carry the interest contended for; as where a testator, after beginning with the usual introductory words as to his worldly substance, gave to his mother his house and lands of *G.* for the term of her life, without the liberty of committing waste thereon, and by the residuary clause devised to her *all the remainder and residue of all his effects*, both *real and personal*, she was adjudged to take the fee under the residuary clause of the will. So, here, the testatrix, by the conveyance of "all the rest and residue of her personal and testamentary estate and effects," intended to convey all that she had not before disposed of, which intention must be carried into effect from the words contained in the whole of the will; and if the residuary clause be connected with the general introductory words, it is perfectly clear that the real estate in fee will pass to the devisee, notwithstanding the apparent inconsistency of the intermediate clause, by the terms of which an estate for life only might pass.

Mr. Serjt. *Bosanquet* in reply.—The words "rest and residue" in the residuary clause, are merely words of relation, and are of themselves incapable of passing the absolute interest, and must therefore have a necessary reference to property of the testatrix before mentioned in the will, from the whole of which it must be collected, whether they were intended to apply to real or personal property. In *Hogan*, d. *Wallis* v. *Jackson*, the word "*real*" was introduced in that clause, which was held sufficient to pass the real estate; but here the word "estate" was accompanied with "personal effects" only. Although the case of *Smith* v. *Coffin* has been re-

(*a*) Cowp. 299.

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lied on as being expressly in point for the defendants, as to the construction of the word "testamentary," yet Mr. Justice *Buller* there observed, that "cases of this sort depend on niceties of expression, and sometimes even on a single word." There, too, the residuary estate was charged with the payment of debts, and the executor was appointed in a distinct clause, while here, as to the legacies it is quite clear they were to be satisfied out of the personalty, as they were directed to be paid within three months after the decease of the testatrix; and they could not have become a charge on the real estate, unless she had so expressed herself in the will. That case, therefore, is distinguishable from the present, as here, her intention is as strong to shew that she intended the devisee to have possession of her personal property only, as it there was to convey a real estate; for by the clause immediately preceding the residuary one, all her lands, and particularly those in question, were devised, and that clause only applied to her real estate, whilst in the introductory and residuary clauses, she had confined her expressions to the bequests of personalty only, using precisely the same terms as were adopted and applied to the two legacies directed to be paid by the devisee as her executor.

Lord Chief Justice DALLAS.—Every case of this description depends on its own peculiar circumstances, each of which embraces a question of construction, which must be collected from the whole of the will. It may therefore, be premised by way of observation, that every case on the construction of such an instrument, must be considered individually, and looked at carefully, and with caution. This is the more evident, from the multiplicity of decisions in questions relative to devises of real property, and the very nice distinctions which have been drawn respecting them. The case of *Smith* v. *Coffin* has been said to be expressly in point, where Mr. Justice *Buller* most justly observed (*a*)

(*a*) 2 Hen. Blac. 450.

that "cases of this sort depend on niceties of expression, and sometimes even on a single word, and as it has been frequently said, the nonsense of one man cannot be a guide for that of another. But the question must always be what was the intention of the testator? That is the polar star by which we must be guided."—Speaking for myself, I should be extremely cautious in deciding a case of this description upon the authority of another, unless upon comparison, they are found to be literally and substantially the same. If I now entertained any doubt, I should require time for further consideration; and more particularly so, as *Smith* v. *Coffin* appears to be a single case as to the construction of the words "testamentary estate," in the residuary clause of a will, and rather extending the doctrine as to the effect of such a clause. Though I do not say the decision of the Court was not warranted by principle, still, however, the determination in that case has not been adverted to by the general text-writers; and it is therefore now pressed on me for the first time. Here, it appears to be evident from the meaning of the will, that the testatrix intended to dispose of the whole of her property: and the presumption is, that where it is apparent on the face of the instrument, that all the property should pass, it must be intended that the testator meant that the whole of his property, both real and personal, should be disposed of. That however, is not sufficient, unless words of inheritance be added, or other words adopted equivalent thereto, so as to carry a fee. Here, under the clause devising the lands and tenements in question, there are no such words; and if that clause be taken alone, it is quite clear that an estate for life only passed to the devisee; but as I have previously observed, the whole of the will must be considered together; and the question then is, whether connecting the word "testamentary," in the residuary clause, with the general introductory words, it was the intention of the testatrix to dispose of the whole of her property, so that an estate in fee should pass to the devisee?

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Generally speaking, the words "rest and residue" are not sufficient for that purpose. There are many cases in which the words "estate and effects" have been construed to convey a fee, from the company in which they are found; but if here, those words only had been used, and the testatrix had devised the lands expressly by a former clause to the devisee, still, by giving him the "rest and residue" of her "estate and effects," they would pass her personal property only, as the lands were expressly devised before; and it must therefore be supposed, that she thought she had disposed of them in the manner she intended. Considering however, that the case of *Smith* v. *Coffin* is undistinguishable from the present, as there, as well as here, the word "testamentary," was accompanied in the residuary clause by nearly the same expressions, relating only to personal effects; and as the testatrix in the introductory clause, professed to dispose of all her property, I concur with Mr. Justice *Buller* and Mr. Justice *Heath*, that the expressions in the residuary clause might include a real estate, as they are to be taken in the largest sense, in order to correspond with the introductory part of the will; and therefore, that the word "testamentary" may be as well applicable to real as personal estate. Indeed the latter, in delivering his opinion in that case, observed (*a*), that "the word 'testamentary' was a most comprehensive term, and that the Court would interpret it in much too narrow a sense, if it were to be confined to personal property. That after the devise of the personal estate, the testator might have changed his mind, and designed to give also his real estate, by the residuary clause. The word 'testamentary,' therefore might be considered as declaratory of a subsequent intention to that effect."—This might be inferred in the present instance. I am therefore, unable to distinguish this case from that of *Smith* v. *Coffin*; and on looking at the circumstances belonging to each, I think the devisee, *John Gilbert*, took an estate in fee in the lands devised to him by the will of the testatrix.

(*a*) 2 Hen. Blac. 451.

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Mr. Justice PARK.—There can be no doubt as to the general intent of the testatrix: she clearly meant to dispose of the whole of her property, both real and personal. A distinction has been taken in the course of the argument, between spiritual and temporal effects; but the word "testamentary" does not apply to bequests of chattels alone, as it was introduced into the statutes of wills, as being applicable to devises of lands. It is true, that although introductory words will not convey every thing which a testator may possess, yet they are of great use to aid the construction, and shew his general intent; for as was observed by Lord *Ellenborough*, in the case of *Doe*, d. *Bates* v. *Clayton* (*a*), "To give effect to the devise, the devisee must have been intended to take an estate commensurate with the desire of the testator; and as an estate for life would not be adequate to such purpose, it follows that the devisee must have been intended to take a fee. This construction may be considered as in a degree aided by the introductory words of the will, respecting his worldly and temporal estate, &c. which are allowed to have some weight in cases where the intent of the testator is doubtful, and where there are other words in the will to carry his intent into effect." Here it must be assumed that the fee in the lands of *Bromehills* and *Blackhills* did not pass by the clause in which that property is specifically devised. It is therefore necessary to refer to the residuary clause, from which it appears to me that it did; and more particularly so, if it be coupled with the decision in *Smith* v. *Coffin*, from which I am altogether at a loss to distinguish it. Mr. Justice *Heath* there observed, that "the word 'testamentary' was a most comprehensive term, and that it would be interpreted in much too narrow a sense, if it were to be confined to personal property, and that there were no circumstances in the will to controul that body of evidence, if it might be so called. That wills were frequently made *in extremis*, sometimes when the agonies of death were

(*a*) 8 East, 147.

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approaching, and it would be unfair to construe strictly the words used by an ignorant testator in that situation." Besides, the Courts have been more liberal in the construction of words in modern times than was formerly adopted; and more particularly so, in cases of devises of lands with an imperfect local description, to which they have given a far larger latitude. Although the point in this case turns principally on the introduction of the word "testamentary" in the residuary clause of the will, yet, in such a clause, where the word "estate" comes after several words properly descriptive of personalty only, Lord *Hardwicke* laid down the distinction in *Tilley* v. *Simpson* (*a*), *viz*, that where the preceding words fully comprehend all the personalty, so that there is nothing to satisfy the word 'estate,' unless it be held to apply to the real property, there, notwithstanding the company in which it is found, it will pass the real property of the testator. The case of *Timewell* v. *Perkins* merely shews, that there can be no room for doubt where the testator explains his own meaning of the word "estate," by shewing of what he understands it to consist; that, therefore, does not appear to me to be applicable to the present. As therefore, the word "estate" has been held to include real property as well as personal, where it has not been confined by the testator to the latter description alone; and further, if a testator devise all his personal "estate and estates whatsoever," the inheritance shall pass by the latter words (*b*), as well as on the authority of *Smith* v. *Coffin*, I am of opinion that the fee passed to the devisee under the will in question, and consequently that a verdict must be entered for the defendants.

Mr. Justice BURROUGH.—In deciding questions of this description, as to the intention of a testator, I rely wholly on the words of the will itself, and not on the authority of previous cases. Here, I think there can be no

(*a*) 2 Term Rep. 659, n.——(*b*) Id. 660.

doubt whatever as to the meaning of the testatrix. It is true, that although introductory words do not of themselves pass an estate of inheritance, still, they are important to shew the intention of the maker of the will. The testatrix, at the commencement, stated, that "as for her *temporal* estates and effects, she gave and disposed of the same in manner following," and after bequeathing two small legacies, she "gave, devised, and bequeathed unto *John Gilbert*, all her lands and tenements, and particularly those called *Bromehills* and *Blackhills*, and which were lately the lands of her husband." There can be no doubt but that she intended that the words "temporal estates and effects" should apply as well to lands as to chattels, and that the legacies might be paid out of either; and by the clause devising the lands, she meant that the temporal estates might apply to them, so as to pass to the devisee an estate in fee. It is not necessary however to consider, whether such an estate passed by the former part of the will or not; for the testatrix's intention appears to me to be clear from the residuary clause, by which she "gave and bequeathed all the residue of her goods and chattels, personal and *testamentary estate and effects whatsoever*," which are sufficient to include the fee; for at the outset she contemplated that her temporal estates would connect the lands with them, and she afterwards adopted the word "testamentary," in the same sense as "temporal," in the introductory part of the will. On looking therefore, at the whole of the will, although the fee might not have passed by the introductory words, or the clause by which the lands in question were specifically devised, yet, it appears to me, that the residuary clause, as coming after the expressions therein adopted by her, would be sufficient so to do.

Mr. Justice RICHARDSON.—It is unnecessary for me to add more than a few observations, as I fully concur with

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the Court in thinking, that an estate in fee passed to the devisee under the residuary clause of the will. Unless it did, the latter part of it would be inoperative. "All the rest and residue of my goods and chattels" would have passed all the personal estate of the testatrix; and unless the word "testamentary" were intended to have been applied to other property, it would have been useless and tautologous. By the introduction of the words "personal and testamentary estate whatsoever," I think it must be intended that she meant to pass all the property she possessed, both real and personal, to the devisee. At all events, this is the safest construction, if the intent of the testatrix be attended to throughout the will. It has been said however, that the word "testamentary" applies only to a bequest of chattels, and not to a devise of lands. But that is answered by a reference to the statutes of wills; and here, at the very commencement of the will, the testatrix declared, that she made it as her "last will and testament," from which it must be inferred, that she meant it to apply to her real as well as personal property; and in the residuary clause she appears to have made the same distinction.

Judgment for the defendants.

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ROBINSON *v.* SUNDELL.

Monday, Nov. 19.

If a defendant be arrested for a sum under 20*l.*, and defend the action until the debt and costs amount to nearly 100*l.* and afterwards gives a warrant of attorney for the amount of the original debt and such costs, under which judgment was entered up, and he was taken in execution: Held, that he was not entitled to his discharge under the statute 48 *Geo.* 3. *c.* 123, although he had lain in prison more than twelve months, as the warrant of attorney did not appear to have been improperly obtained from him, nor was he in custody at the time it was given.

MR. Serjt. *Pell* applied for a rule to shew cause why the defendant should not be discharged out of custody in execution in this suit, pursuant to the statute 48 *Geo.* 3. *c.* 123 (*a*), on an affidavit which stated, that he had been arrested for 19*l.*; that he defended the action until the costs amounted to nearly 100*l.*, when he gave a warrant of attorney to the plaintiff to confess judgment for that sum, which was afterwards duly entered up. It was also sworn, that he was taken in execution for the last-mentioned sum, and that he had been in prison under it for more than twelve calendar months.

The learned Serjeant submitted, that this was an oppressive proceeding on the part of the plaintiff; and that the Court in the exercise of their discretion would take cognizance of the original debt, for which the defendant had been arrested, although the judgment entered up on the warrant of attorney, and under which he was taken in execution, amounted to more than 20*l.*

But the Court held, that the statute only extended to persons in execution on judgments, which in this case appeared to have been properly entered up on the warrant of attorney for the amount of the original debt and costs, and that as it did not appear that such instrument had been obtained from the defendant by coercion, or that it was executed by him when he was in custody, he was not entitled to relief.

Rule refused.

(*a*) By which it is enacted, that "all persons in execution upon any judgment obtained in any Court, &c. for any debt or damages not exceeding 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months, next before the time of their application to be discharged, may, upon application for that purpose in Term time, made to some one of his Majesty's superior Courts of record at *Westminster*, to the satisfaction of such Court, be forthwith discharged out of custody, as to such execution, by the rule or order of such Court."

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Tuesday, Nov. 20.

HUDSON and Another *v.* HARRISON.

Where a ship was wrecked on the 21st *December*, and three-fourths of her cargo, consisting of wines, were either lost or impregnated with salt water, and the assured gave notice of abandonment, as for a total loss, on the 23rd, being the day on which they heard of the loss, and before the remains of the cargo were brought on shore:—Held, that it amounted to such a loss as warranted the notice of abandonment. Underwriters intending to resist an abandonment, are bound to do so within a reasonable time; where, therefore, the assured, four days after a notice of abandonment had been given, called a meeting of the underwriters at *Lloyd's*, three of whom attended and authorised the assured to act as if no assurance had been effected, and the damaged wines were accordingly advertised for sale, but previous to its taking place, some of the underwriters forbad it, and rejected the notice of abandonment, after more than two months had elapsed, during which time they had not interposed:—Held, that their silence for so long a time was such an acquiescence by them as to amount to an acceptance of the abandonment, and that they could not afterwards prevent the sale.

THIS was an action of *assumpsit*, brought by the plaintiffs to recover 300*l.* from the defendant, being the amount of his subscription to a policy of assurance for 7000*l.*, effected in the name of the plaintiffs, or as agents, and dated on the 6th *December*, 1819, on goods in the ship "*Swallow*," on a voyage "at and from the *Cape of Good Hope* to *Bristol*, *Liverpool*, and *Dublin*, all or either, including the risk of craft, at the premium of two and a half guineas *per cent.*, to return ten shillings *per cent.* for such part of the interest as might be discharged at her first port." By a memorandum in the policy, the insurance was declared to be "on wines, valued at 25*l.* *per* pipe, and at the same rate for hogsheads." The declaration averred the interest in the goods insured to be in the plaintiffs and *Daniel Dixon*; the sailing of the vessel with the goods insured on board, on the voyage insured; and a total loss of the goods by the perils of the seas. The defendant pleaded the general issue.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, the Jury found a verdict for the plaintiffs, damages 300*l.*, subject to the opinion of the Court, upon the following case:—

The plaintiffs are partners with *Daniel Dixon* at the *Cape of Good Hope*, under the firm of *Thomas Hudson*, *Dixon* and *Co.*, and they are also partners in *London*, under the firm of *Thomas Hudson*, *Donaldson*, and *Co.* On the 31st

August, 1819, *Daniel Dixon*, in the name of his firm, entered into a charter-party under seal, at the *Cape of Good Hope*, with *John Phillips*, master of the *Swallow*, by which she was hired to take a cargo of wine for a voyage from the *Cape of Good Hope* to *Bristol*, for orders from the plaintiffs; and having there unloaded such part of the cargo as they should direct, she was to proceed to the ports of *Liverpool*, *Dublin*, or *Cork*, or any two of them the plaintiffs might direct, and discharge the remainder; and upon the delivery of the cargo, freight was to be paid as follows, *viz.* for such part of the cargo as was discharged at *Bristol*, 30*s.* *per* pipe, or two half pipes, with five *per cent.* primage, and 27*l.* 10*s.* as port charges; for such part of the cargo as was discharged at the second port of *Liverpool*, *Dublin*, or *Cork*, 32*s.* 6*d.* *per* pipe or two half pipes, with five *per cent.* primage, and 25*l.* as port charges; and for such part of the cargo as was discharged at the third port of *Dublin* or *Cork*, 35*s.* *per* pipe, or two half pipes, with five *per cent.* primage, but without any allowance as port charges. On the 25th *September*, 1819, *Daniel Dixon* shipped at the *Cape*, on board the *Swallow*, the wine in question, which consisted of 241 pipes and 71 half pipes or hogsheads of Cape wine, the property and on the account and risk of himself and the plaintiffs, of the value, according to the invoice price, of 7947*l.*, of which he advised the plaintiffs by letter, in consequence of which letter, the policy in question was effected. The *Swallow*, with the wines insured, sailed from the *Cape* on the 9th *October*, 1819, and in the night of the 21st *December* following, was driven by a gale of wind on the rocks near *Portishead*, about thirteen miles from *Bristol*, and soon afterwards fell over on her side. On the 23rd *December*, the plaintiffs in *London* heard of the vessel being on shore, and the same day gave notice of abandonment to the defendant, and the other underwriters to the policy. On the 22nd *December*, the master of the *Swallow* went to *Bristol*, and applied to

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Messrs. *Alexander*, merchants and ship agents there, who were unknown to the plaintiffs and the underwriters, for their assistance, desiring them to do the best for all concerned. On the same day, the Excise and Custom-house officers proceeded to the vessel, for the purpose of protecting the revenue, and to assist in saving the cargo. Messrs. *Alexander* engaged lighters and craft to bring the cargo to *Bristol*. On the 22d *December* eleven casks were taken out of the vessel, and a hole was cut in her side, through which the remainder of the cargo was removed into lighters, on the six following days, and taken to *Bristol*. The tide rises at *Portishead* nearly forty feet, and at high water the whole of the cargo was almost covered with the sea, and the greatest part remained under water for about nine hours, between flood and flood, and when part had been removed, the residue floated in the vessel. Seventeen of the casks were empty, and some leaked when they were taken out. The vessel was afterwards floated to *Bristol*, and being incapable of repair her materials were sold. The plaintiffs intended to land 100 pipes of the wine at *Bristol*, and to send the residue to *Dublin*. If the 100 pipes had arrived safe, they would have sold at *Bristol* from about 25*l*. to 26*l*. *per* pipe, but no offer was made by the master or owner of the *Swallow* to forward the remainder to *Dublin*. The plaintiffs called a meeting of the underwriters for the 27th *December*, at *Lloyd*'s Coffee House, *London*, at which only three of them attended, and they authorised the plaintiffs to send a person to *Bristol*, at the expence of the underwriters, to superintend the preservation of the cargo, and to act in every respect as if there had been no insurance, and the plaintiffs accordingly sent a person to *Bristol* for that purpose. The defendant did not attend that meeting. The wines saved were placed by Messrs. *Alexander* in vaults under the king's locks. A claim was made by the revenue officers at *Bristol*, for salvage of the cargo, which upon a hearing before the magistrates, was dismissed. After the

survey, Messrs. *Alexander*, without any authority from the plaintiffs, or the underwriters, but acting according to their judgment for the benefit of all concerned, advertised the wines for sale by auction at *Bristol*, on the 1st *March*, 1820, on account of the underwriters, of which they gave a month's notice in the country newspapers, and in the *Public Ledger* in *London*. On the day preceding the intended sale, Messrs. *Alexander* received a letter from the attornies for the defendant, dated *London*, the 26th *February*, stating, that they had been consulted by several of the underwriters on the *Swallow*, and noticing the advertisement for the sale, and that no misunderstanding or prejudice might thereafter arise on that subject, they informed them, that the underwriters did not sanction the sale, but denied any right of sale by which their interest could be affected; and they also denied that any right of abandonment existed in the insured; and that should any of the wines have been lost or damaged by any peril insured against, the underwriters would be ready to pay any such loss as might arise upon them; and that if any of the wines were not at their port of destination, the underwriters required the same to be forwarded, and they would be ready to pay any expences or charges properly incurred, to which they might be liable under the policy. A number of persons from different parts of the country had assembled at the time and place of sale, but in consequence of this letter it was postponed. On the 17th *March*, 1820, the attorney for the plaintiffs wrote to the attornies for the defendant, proposing that the wines should be sold without prejudice to any of the questions that had been made, or that might thereafter arise on the part of the insured or the underwriters. No answer having been returned to this letter, the plaintiffs on the 1st *April*, 1820, wrote to Messrs. *Alexander*, requesting that they would sell the wines on account of the concerned, and that they would incur no expences but such as were necessary. The wines saved consisted of 229 pipes

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and 67 hogsheads; 71 pipes and 43 hogsheads were sound and full; 44 pipes and 6 hogsheads were impregnated with salt water; 17 pipes and 4 hogsheads were quite empty; the others had either partially leaked, or were affected more or less with salt water, but in the opinion of some of the witnesses, were merchantable, and were sold by auction at *Bristol*, on the 24th *April*, 1820, and produced the sum of 4044*l.* 2*s.* 6*d.* which was received by Messrs. *Alexander*. From this gross produce they deducted the charges they had paid for taking the cargo out of the vessel, removing it to *Bristol*, landing and warehousing it, and of the sale by auction, and their commission of 5*l.* *per cent.* upon the proceeds. The master and owner of the *Swallow*, having claimed the freight, primage, and port charges upon the wines, which were conveyed to *Bristol* from the wreck, at the rate stipulated in the charter-party, for such part of the cargo as should be discharged there, Messrs. *Alexander* retained 460*l.* 12*s.* 6*d.* to answer that claim. By these deductions, the net proceeds of the sale were reduced to 2570*l.* 16*s.* 3*d.* which, with the freight, primage, and port charges, remained in the hands of Messrs. *Alexander*, to be paid to the party entitled to them. But the witnesses for both parties were of opinion, that it was best for the interest of all concerned, to sell a cargo so circumstanced by public auction at *Bristol* and every thing was done for obtaining the best prices for the wines.

The question for the opinion of the Court was, whether, upon the facts stated, the plaintiffs were entitled to recover for a total loss, with benefit of salvage to the underwriters? If they should be of opinion that the plaintiffs were entitled to recover as for a total loss, then the verdict was to stand; but if the Court should be of a contrary opinion, then it was to be referred to an arbitrator, to determine the average loss, subject to any directions which the Court might give thereupon.

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The case came on for argument this day, when

Mr. Serjt. *Hullock*, for the plaintiffs, submitted, that this was a total loss, with benefit of salvage. At one period it is quite clear that there was a total loss, so as to entitle the assured to abandon, and the only question is, whether the subsequent circumstances as stated in the case, divested them of their right of abandonment, so as to reduce it to an average loss. The notice of abandonment was given at the earliest possible moment, and the assured had a right to abandon at the time. The principles on which the present case must be decided, are of modern introduction. The doctrine laid down by Lord *Mansfield*, in *Goss* v. *Withers*(*a*), and *Hamilton* v. *Mendes*(*b*), has never been impugned as to principle, although it has been commented on, and may appear contradictory to later decisions. In the latter case, his Lordship in effect said, that "if the voyage be so defeated as not to be worth the further pursuit; if the salvage be high, and the other expences great, or if the underwriter refuse to bear these expences, the insured may abandon." In the former, which was the first case in which the doctrine of abandonment was fully gone into, his Lordship observed(*c*), that "the loss and disability were in their nature total at the time they happened."—So here, the part of the cargo which might have been saved at the time of the wreck, might not be worth the expence necessarily attending it, which was proved by the offer of the assured to abandon; the loss therefore, was total in its nature, at the time the notice of abandonment was given:—and his Lordship went on to say, that "he could not find a single book, ancient or modern, which did not say, that in case of the ship being taken, the insured might demand as for a total loss, and abandon.—That the cargo was in its nature perishable; and the voyage as absolutely defeated, as if the ship had been wrecked, and a third or

(*a*) 2 Burr. 697.——(*b*) Id. 1209. S. C. 1 Sir Wm. Blac. 276.——(*c*) 2 Burr. 696, 7.

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fourth of the goods saved. That in questions upon policies, the nature of the contract, as an indemnity, and nothing else, is always liberally considered; that the loss was total at the time it happened; that it continued total, as to the destruction of the voyage; and that a recovery of any thing could be had, only upon paying more than half the value, (including the costs.)" And in *Milles* v. *Fletcher*(*a*), his Lordship remarked, that "no cases said, that the bare existence of the hull of the ship prevented the loss being total;" and he adopted the rule laid down by him in *Hamilton* v. *Mendes*. This doctrine is directly applicable to the facts of the present case, in which there is no doubt but that at one time the loss must be considered as total. Besides, the principles laid down by Lord *Mansfield*, were confirmed in the case of *Manning* v. *Newnham*(*b*), where his Lordship determined, that if the ship be prevented from proceeding on her voyage, and the voyage be thereby lost, it is a total loss, not only of ship and freight, but also of the cargo, if no other ship can be procured to carry the latter to its port of destination. In *Wilson* v. *The Royal Exchange Assurance* (*c*), Lord *Ellenborough* acceded to that doctrine, and thought, that if the voyage was not worth pursuing, and that there were no means of pursuing it, it must be considered a total and not an average loss. And in *Buller* v. *Christie*(*d*), which was an insurance on 1950 boxes of soap, and the ship ran aground, and was bulged, and the water flowed in and wetted that part of the soap which was towards the bottom of the hold, but out of the 1950 boxes only 17 were totally lost, and the rest were saved and carried ashore in barges, and delivered into the warehouses of the assured; and it appeared that they had sustained damage from the sea water, not exceeding 20*l. per cent.*—his Lordship held it to be a total loss, without abandonment. That case is infi-

(*a*) 1 Doug. 238.———(*b*) Park on Ins. 6th edit. 221. S. C. 2 Camp. 624, n.———(*c*) Id. 625.———(*d*) 2 Maul. & Selw. 374, n.

nitely stronger than the present, as only a small proportion of the cargo was injured; whilst here, three-fourths of it was either lost or had received such an injury that it would have been detrimental to the owner to have sent it on; and the wines which were affected by the salt water were more deteriorated than soap could possibly be, as they would become worse every day. In *Hunt* v. *The Royal Exchange Assurance* (*a*), it was decided, that a loss of voyage for the season by perils of the sea, is not a ground of abandonment upon a policy on goods, with a clause of warranty, free from average, &c. where the cargo is in safety, and not of such a perishable nature as to make the loss of voyage a loss of the commodity, although the ship be rendered incapable of proceeding on the voyage; but a distinction was there drawn between goods of a perishable or imperishable nature, for Lord *Ellenborough* said (*b*), that "if indeed the cargo had been of a perishable nature, it would not have been a case of retardation only, but of destruction of the thing insured;" and Mr. Justice *Bayley* added (*c*), that "where goods are safely warehoused in an undamaged state, and where there is nothing but a disappointment of voyage to constitute a ground of abandonment, the assured have no right to abandon. That the policy there was on goods, which were not so necessarily connected with the ship, that if she were lost, there must be of course a loss of voyage with respect to the goods; because if the goods were in safety, they might be transhipped, and conveyed to their destination: that it was true that the goods could not be forwarded immediately in another ship, but *non constat* that they might not be sent at a future time; and that if a cargo be of an imperishable nature, it matters not, except as it regards the market, whether it reaches its destination in the autumn, or in the spring following." The ground of the decision in that case therefore was, that the cargo had sustained no injury, but might be forwarded in a sound state at

(*a*) 5 Maul. & Selw. 47.——(*b*) Id. 55.——(*c*) Id. 57.

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a subsequent time. So, in *Anderson* v. *Wallis*(*a*), the cargo consisted of copper and iron, which were not of a perishable nature, nor capable of sustaining injury from delay.

At all events, the plaintiffs are entitled to recover on the facts, for they gave a notice of abandonment as soon as they possibly could, *viz.* on the 23d *December*, and called a meeting of the underwriters for the 27th, at *Lloyd's*; and although three only attended, it must be inferred that the others acceded to the plan then proposed to be adopted, as it is the constant course for underwriters to appoint a few as a committee, by whose acts those who are absent are bound; and notwithstanding the defendant did not attend in person, he must still be concluded by the proceedings of those who did, and who not only authorised the plaintiffs to send a person to *Bristol* at their expence to superintend the preservation of the cargo, but to act in every respect as if there had been no insurance; they therefore, in point of fact, authorised the sale, as the plaintiffs were to act for the best. Besides, the wines were advertised nearly two months before they were sold, and either of the three underwriters might during that period have retracted the authority which they had given to the plaintiffs; and it was proved by the witnesses for both parties, that it was for the interest of all concerned to sell the cargo by public auction at *Bristol*. This part of the case therefore, falls within that of *Milles* v. *Fletcher* (*b*), where the plaintiff went for a total loss, and the defendant insisted that he was only entitled to recover for an average loss, on account of the improper conduct of the captain; but Lord *Mansfield* there observed (*c*), that "the captain, when he came to *New York*, had no express order, but he had an implied authority from both sides, to do what was right and fit to be done, as none of them had agents in the place; and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this was within his contract of

(*a*) 2 Maul. & Selw. 240.——(*b*) 1 Doug. 231.——(*c*) Id. 234.

indemnity." So, in *Idle* v. *The Royal Exchange Assurance Company* (*a*), it was decided, that under circumstances of extreme necessity, the master was warranted in selling the ship and cargo; and although the Court of King's Bench afterwards awarded a *venire de novo*, still, the ground of that decision remains uncontradicted and unimpugned. On the whole therefore, but more particularly from the reasoning of the Court of King's Bench in the case of *Hunt* v. *The Royal Exchange Assurance*, this case comes expressly within it, as the cargo was not only of a perishable nature, but three-fourths of it were destroyed or deteriorated in value; whilst there, it was warehoused in a sound state, and capable of being afterwards forwarded; and in *Smith* v. *Robertson* (*b*), where there was a loss by capture, intelligence of which was received and an abandonment made, and a re-capture took place before the notice of abandonment was given, but there was no intelligence received of such re-capture until after some steps had been taken by the underwriters to settle the loss:—it was held to amount to an acceptance of the abandonment by them; and it was doubted whether they would not have been bound; on the principle, that the moment an abandonment is made, on intelligence of a total loss having actually happened, without any contrary intelligence, the transaction is closed, and not to be affected by subsequent events or intelligence; and the Lord Chancellor not only seemed to doubt the authority of *Bainbridge* v. *Neilson* (*c*), and *Falkner* v. *Ritchie* (*d*), but was far from being satisfied with these decisions.

Mr. Serjt. *Taddy*, for the defendant, contended, that there had not been, at any time, a total loss of the cargo; nor was it ever in such a state as to warrant an abandonment, a considerable part of the wines having remained uninjured. Even supposing that the loss might have been

(*a*) Ante, vol. iii. page 115.——(*b*) 2 Dow. 477, 480.——(*c*) 10 East, 329.——(*d*) 2 Maul. & Selw. 290.

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total at one period, and the abandonment well made, still, the plaintiff's right to recover as for a total loss is not only unfounded, but destroyed by subsequent circumstances. In *Patterson* v. *Ritchie* (*a*), where an abandonment was offered to be made by the assured to the underwriter, upon intelligence brought of the capture of the goods insured, which the underwriter refused to accept, it was determined not to entitle the assured to recover as for a total loss, where, before action brought, the goods were re-captured and arrived at the place of destination, by which a partial loss only was sustained; on the ground that the assured can only recover an indemnity for such loss as he has sustained, at the time of action brought:—because to allow him to recover as for a total loss, for that which in fact is not lost, would be giving him more than he would be entitled to under the policy, which is only a contract for indemnity; and Mr. Justice *Bayley* there said (*b*), "Lord *Mansfield*, in *Hamilton* v. *Mendes*, expressed his opinion, that it would be repugnant, upon a contract of indemnity to recover for a total loss, where at the time of action brought it turns out that the loss is only partial. And so it appears to me in this case, the plaintiff can only recover in respect of that which constituted a loss at the commencement of the action." That must now be considered as the settled law on this subject, and if it were not so, it would be extremely difficult to say when an underwriter could be deemed liable to pay, either for a partial or a total loss. What shall be considered to amount to a total loss, has always been a question of doubt and uncertainty, and not confined to any particular state, but founded on the customs of nations, and the principles of reason, justice, and universal law; and on which the opinions of foreign writers have always differed. In *France* it appears, that by the ordinance of *Louis* the Fourteenth, in order to entitle the assured to recover as for a total loss, it must be total, and must continue so at the time of action

(*a*) 4 Maul. & Selw. 393.——(*b*) Id. 397.

brought, or the payment of the money. So, *Emerigon* thought, that the loss must be total in the strict sense of the word. *Le Guidon*, however, said, that the insured might abandon to the underwriter, and call upon him for a total loss, if the damage exceeded half the value of the thing; but in the *New Code de Commerce* (*a*), three-fourths of the value is required to constitute a total loss. It is therefore difficult to draw a line what degree of loss shall be deemed to amount to a total loss in this country. [Mr. Justice *Burrough*.—In other countries, questions of this nature turn on foreign ordinances, whilst here, they are founded upon principles, established upon the solemn and permanent basis of reason and good sense.] [Lord Chief Justice *Dallas*.—I understand the rule to be, that if the profits be reduced one-half, the insured is at liberty to abandon.] It is true that Lord *Mansfield* considered it so, in the cases of *Goss* v. *Withers* and *Hamilton* v. *Mendes*, in the former of which he observed (*b*), that "half the value must be paid for salvage," yet in the latter he said (*c*), that "the property returned to the plaintiff was pledged to the re-captors for one-eighth of the value, as salvage for re-taking and bringing the ship into an English port; and that upon paying this, the owner was entitled to restitution, and the re-captor had no right to sell the ship. And although his Lordship there recognized the principle upon which *Goss* v. *Withers* was decided, he said, that "it does not necessarily follow, that because there has been a re-capture, that therefore the loss ceases to be total; that if there be such an interruption as defeats the voyage, or renders it not worth pursuing, or if the salvage be high, or further expence necessary, and the insurer will not, at all events, engage to pay it, the insured may abandon;" still, that doctrine has been much narrowed by later decisions; for in *Falkner* v. *Ritchie* (*d*), which was an insurance on ship, Lord *Ellenborough* observed (*e*), that

(*a*) Art. 369.——(*b*) 2 Burr. 696.——(*c*) Id. 1209.——(*d*) 2 Maul. & Selw. 290.——(*e*) Id. 293.

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"there was a looseness and generality in the expressions in the cases of *Goss* v. *Withers* and *Hamilton* v. *Mendes*, that made one inclined to pause upon them. And he asked, what has a loss of the voyage to do with the loss of the ship? On this subject, there is so much good sense in the judgment of Chief Justice *Willes*, in *Pole* v. *Fitzgerald* (*a*), that it may be of great use to resort to it, in order to purify the mind from these generalities." The case of *Falkner* v. *Ritchie* was decided on the principles of *Everth* v. *Smith* (*b*) and *Anderson* v. *Wallis* (*c*), where it was held, that a retardation of the voyage for the season did not warrant the assured in abandoning, and throwing the burthen on the underwriter. In *Manning* v. *Newnham*, it appeared not only that the ship was incapable of pursuing the voyage, but that no other vessel could be procured to take the cargo on board; on which ground it was decided that the voyage in contemplation was lost: and Lord *Ellenborough* so considered it in *Wilson* v. *The Royal Exchange Assurance* (*d*), where the vessel was incapable of pursuing her voyage, and another could not be procured, to forward her cargo, consisting of corn, to its port of destination:—his Lordship thought, that there were no means of pursuing it; but if there had been any other vessel by which the cargo could have been forwarded, it would have been the duty of the assured to do so, although the greater part of it, consisting of wheat, was either wet or spoiled. The same distinction was taken by Mr. Justice *Bayley*, in *Hunt* v. *The Royal Exchange Assurance*, where he said (*e*), "there are cases certainly, which speak of a loss of voyage as a ground of abandonment; and such cases may be conceived. For instance, if a ship were so damaged, as to be obliged to land her cargo at an unfrequented place, where there was no opportunity of disposing of the cargo, and the ship owner could not procure another vessel to forward the cargo, except at an expence exceeding the value

(*a*) Willes, 641.——(*b*) 2 Maul. & Selw. 278.——(*c*) Id. 240.——(*d*) 2 Camp. 625.——(*e*) 5 Maul. & Selw. 56.

of the goods; such a case, I think, might warrant an abandonment, and throw the loss on the underwriter." Although the cargo was not damaged in that case, it makes no difference; for here, a great part of it was saved, and 71 pipes and 43 hogsheads remained sound and full, and were safely landed at *Bristol*, where a ship might have been procured to carry them on to *Ireland*, and therefore, the voyage ought to have been pursued; and as 17 pipes and 4 hogsheads only were empty, the loss did not amount to a total one, but merely a retardation of the voyage. In *Glennie* v. *The London Assurance* (*a*), where a ship was wrecked, and the cargo greatly damaged, and produced little more than sufficient to pay freight and salvage;—it was decided to be a particular average only, and not a total loss with benefit of salvage. [Mr. Justice *Richardson*.—In that case there was no abandonment, and the question turned on the construction of the clause in the policy against particular average.] The case of *Thompson* v. *The Royal Exchange Assurance* (*b*), is stronger than the present, where, on a policy on goods free from particular average, it was held, that the underwriters could not be made liable to a total loss, although the assured gave immediate notice of abandonment, and the ship was wrecked, but the goods were brought on shore, but in so damaged a state that they became unprofitable to the assured; and Lord *Ellenborough* there said (*c*), "We can only look to the time when the loss happened, and the goods were landed, and then it was not a total loss, however unprofitable they might afterwards be." And although in that case there was a clause exempting the underwriters from particular average, it makes no difference in point of principle; for even if there had been a total loss, they would have been liable notwithstanding that clause. So, in *Glennie* v. *The London Assurance* Mr. Justice *Bayley* observed (*d*), "It is a question whether the goods can be said to have

(*a*) 2 Maul. & Selw. 371.——(*b*) 16 East, 214. —(*c*) Id. 215.——(*d*) 2 Maul. & Selw. 376.

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reached their destination at all, not whether they have not reached it in a deteriorated state. Upon that I would ask, what has produced the 972*l.* but the rice, which it is contended has been wholly lost." So here, the wines were valued in the policy at 7000*l.*, and produced more than 4000*l.* at the sale. How therefore, can this be said to be a total loss? The underwriters need not have given any direction whatever, for it was the duty of the assured to carry on that part of the cargo which was saved; and as the former objected to the sale before it took place, it was sufficient. In *Buller* v. *Christie* (*a*), there was no notice of abandonment given; and it goes the length of shewing, that where goods do not arrive in a ship, the loss is total: that however, is not supported by any other decision, for the arrival of the particular ship is immaterial, if the cargo could be sent to its place of destination by another; and the mere loss of a voyage does not constitute the total loss of the cargo. [Mr. Justice *Park*.—In *Pole* v. *Fitzgerald* (*b*), it was determined, that the ship and voyage were different things; and the Lord Chancellor cited that case in the course of the argument in *Smith* v. *Robertson* (*c*), and observed, that "the Court of King's Bench had afterwards said, that they were the same, and had taken upon themselves to reverse a judgment of the House of Lords and Exchequer Chamber.]" At all events, as three of the underwriters only attended the meeting, they were not empowered to bind the others, who had either a right to suspend or prohibit the sale before it took place; besides, it does not appear whether those three were duly authorised, or that they communicated the nature of the meeting to the defendant; and whether he had assented to what they did, was purely a question for the Jury. On these grounds therefore, the loss in question can only be considered as an average loss.

(*a*) 2 Maul. & Selw. 374, n.——(*b*) Willes, 641.——(*c*) 2 Dow. 477.

Mr. Serjt. *Hullock*, in reply.—It must be inferred, that the three underwriters who were at the meeting were appointed by the others to act for them, and that they did so under their authority. Every underwriter is not bound to be at a meeting at *Lloyd's*, in case of a loss, but it is the practice to nominate a few as a committee, to act for all, according to the best of their discretion; but as the meeting took place on the 27th *December*, and none of the underwriters interfered till the 28th *February* following, it must be implied that they acquiesced in the abandonment; for if they had disapproved of it, they were bound to repudiate it within a reasonable time; and it would be too much to say, that they might remain silent for more than two months after the notice of abandonment had been given and acted on under their sanction and authority. In *Patterson* v. *Ritchie* Mr. Justice *Le Blanc* said (*a*), "it may make a great difference if the abandonment has been accepted by the underwriter, and it was upon this difference that the House of Lords proceeded in *Smith* v. *Robertson*." Here, when the notice was given, the assured had a clear right to abandon, as the ship was wrecked, and the wines were not taken on shore until six days afterwards, when the greater part of them were affected more or less with salt water. The voyage therefore, was not worth pursuing, as in the case of *Wilson* v. *The Royal Exchange Assurance*. In *Falkner* v. *Ritchie* the insurance was on ship, which after having been captured and re-taken, arrived home, with the loss only of part of her rigging; and the assured received notice of the re-capture before they gave notice of abandonment. So, in *Bainbridge* v. *Neilson* the assured persisted in his notice of abandonment, after he had received intelligence of the recapture. The case of *Manning* v. *Newnham* has never been impugned, but recognised by Lord *Ellenborough* in *Anderson* v. *The Royal Exchange Assurance* (*b*), and *Wilson* v. *The Royal Exchange Assurance*, where his Lordship said,

(*a*) 4 Maul. & Selw. 397.——(*b*) 7 East, 42.

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that "he acceded to it." In *Glennie* v. *The London Assurance* there was no abandonment; and it was decided on the ground that the goods came within the memorandum in the policy. So, in *Thompson* v. *The Royal Exchange Assurance*, the decision turned on the clause in the policy making the underwriters free from particular average; and Lord *Ellenborough* observed (*a*), that "all the goods were got on shore and saved, though in a damaged state; and that if that could be converted into a total loss by a notice of abandonment, the clause excepting underwriters from particular average, might as well be struck out of the policy." Here, however, it has been said that when goods can be carried on by another ship, it is the duty of the assured to do so; but suppose the cargo consisted of fish, it would become putrid before it could reach its port of destination. From the decision in the case of *Hamilton* v. *Mendes*, therefore, to the present time, if a voyage be not worth pursuing, or the salvage be high, the assured may abandon, provided the notice of abandonment be given to the underwriters in due time. Here, it was proved that selling the cargo was the most prudent course to be adopted, and that every exertion was used for obtaining the best price for the wines which were sold. From the distinction taken by the Court in the late case of *Hunt* v. *The Royal Exchange Assurance*, as to goods of a perishable or imperishable nature, it is quite clear, that the loss in question must be considered as total at the time of the abandonment.

Lord Chief Justice DALLAS.—Under what circumstances, generally speaking, the assured have a right to abandon, is a question of an extensive consideration, and embraces a rule of difficult ascertainment, as appears from the difference of opinions formed by the text writers, as well as the number of cases that have been decided on this branch of insurance law. It is quite clear that under certain

(*a*) 16 East, 215.

circumstances, the assured have a right to abandon; and although they may do so in the case of a capture, still, if the vessel be re-captured, so that she may pursue her voyage beneficially, the right of abandonment is thereby superseded. The question then is, under what circumstances is the owner bound to prosecute a voyage, where, as in this case, the ship has been lost, and part of the cargo saved, and the greater part of it either lost or materially damaged? Is he bound to send it on at all? and if so, if only one-half or one-third, or any portion of it remains, is he bound to do so at all events, or only under certain circumstances? That this is a question of uncertainty, and that the rule differs with respect to such proportions, is clear from the different foreign writers on this subject, as well as our own. By the old *French* law it appears, that in order to entitle the assured to recover as for a total loss, the whole subject-matter of insurance must be lost; but *Le Guidon* stated that the underwriter might be called upon for a total loss, if the damage exceeded half the value; and now by the *Code de Commerce* it is settled, that the damage must exceed three-fourths. In *Smith* v. *Robertson* (*a*), the Lord Chancellor said, "it was curious, that while those who had been most concerned in settling what was the law on this subject, had taken great credit to themselves for its certainty; and that the text-writers had boasted of how little uncertainty there was in this branch of the law; and that it might perhaps be found, when the matter came to be examined with the proper degree of impartiality, that there was full as much uncertainty on this subject as in any other branch of the law." Here, therefore, the question depends on the law and custom of this country, in which the loss in question happened. I own I have taken the principle to be, that if the voyage were altogether defeated, or the profits of it reduced below one-half, it was not incumbent on the assured to prosecute his voyage. Whether that rule, which

(*a*) 2 Dow. 479.

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seems to have been adopted by Lord *Mansfield*, has been broken in upon by recent decisions, or whether the observations made upon it by Lord *Ellenborough* be just or not, is unnecessary now to examine or enquire into, as it is not required in this particular case, to the circumstances of which I intend to confine my opinion; and I beg to be expressly understood, as laying down no general rule, as being applicable to other cases, as the subject is of great importance, and there appears to be such a variety of conflicting decisions in those that have hitherto been determined: and perhaps I might commit myself by laying down a rule in too general terms. If circumstances required it, I might compare this case with the others that have preceded it; but I do not conceive it necessary, for the only point is, whether under the particular facts as stated, the plaintiffs are entitled to recover as for a total loss. What then are the facts? There can be no doubt but that what was done was for the best, and for the benefit of all concerned; but on the other hand, if there be even a technical objection, the defendants have a right to make it, and are entitled to the benefit of it. The ship was completely lost, and three-fourths of the cargo either lost or most materially damaged; the assured gave notice of abandonment on the very day they heard of the loss. The duty imposed on them by law is, that they must give such notice within a reasonable time; and what is a reasonable time is a question of law for the decision of the Court. So, the abandonment must be made within a reasonable time, as it is not competent for the assured to lie by to make an election whether they will abandon or not: nor can the underwriters, at any distance of time dispute the validity of the abandonment. What is a reasonable time, must depend entirely on the circumstances of each particular case. The consequences of an abandonment are materially different in their nature, as where a loss arises in a foreign country, the captain of the vessel is considered as the agent both of the assured and underwriter, and he is to

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act according to the best of his discretion and judgment, as there can be no means of giving an immediate notice of abandonment. In that case, therefore, he is to act as beneficially as he can for the benefit of all parties; but if the loss happens in this country, and notice of abandonment be duly given, it is the duty of the underwriters, as soon as they receive it, or at their earliest convenience, to send an agent to do his best. Here, the vessel was lost near *Bristol*. The object of the voyage was defeated, and it was not worth while to prosecute it further. The assured, on hearing this, gave an immediate notice of abandonment. Is it therefore reasonable, that the underwriters should lie by and refuse to accept it, after they had induced the assured to believe in the first instance that they had done so? This would not amount to a mutuality of obligation between the assured and the underwriters. The question then is, whether, under the particular facts of this case, the latter have not induced the former to believe that they had acquiesced in the abandonment, a notice of which was given on the 23d, and a meeting called for the 27th *December*, and the sale was not forbidden, nor the abandonment rejected, until the 28th *February* following, which was more than two months afterwards. They did nothing during the intermediate time, and I think it would be too much to say, that they could interpose just before the sale taking place. I fully agree with what was said by the Lord Chancellor, in the case of *Smith* v. *Robertson*, where he observed (*a*), that "the underwriters could not be allowed to say, that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss." Without therefore, laying down any broad or general rule, but confining myself to a case where the assured may have been induced to believe that the underwriters acquiesced in the abandonment, and who took no steps to repudiate it for so long a time after the notice was given, their acquiescence must be implied; and the

(*a*) 2 Dow. 462.

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underwriters cannot, after so long a time has intervened, interpose and prevent the sale of the cargo. I therefore think that, taking all the circumstances of this case into consideration, there was a complete acquiescence by the underwriters; but if it were necessary, I might go further, and say that the cargo was so reduced, or in such a damaged state, as to render the loss total, at the time the abandonment was made; I however, confine my opinion to the acquiescence in the abandonment by the underwriters, on which ground I think the plaintiffs are entitled to retain the verdict found for them at the trial.

Mr. Justice PARK.—I am of the same opinion, and think that the plaintiffs are entitled to recover as for a total loss. I very much doubt whether it is necessary or prudent to narrow the rule which formerly prevailed, and appears to have been adopted by Lord *Mansfield*, respecting the right of the assured to abandon; and more particularly so, as some of the later cases on this subject cannot as appears to me, be supported to their full extent. With respect to that of *Falkner* v. *Ritchie*, I do not comprehend it; and I have the less hesitation in saying so, as the Lord Chancellor expressed himself as labouring under the same difficulty in *Smith* v. *Robertson*; but this case does not appear to me to differ in any material respect from that of *Hunt* v. *The Royal Exchange Assurance*; because, on looking at the arguments of the Judges, on which their opinions were founded, they treated the cargo as being of an imperishable nature, and therefore did not consider the loss of the voyage for the season a loss of the commodity, but merely a retardation of the voyage; and Lord *Ellenborough* there admitted, that if the cargo had been of a perishable nature, it would not have been a case of retardation only, but destruction of the thing insured; and Mr. Justice *Bayley* went the full length of supposing, that if the goods had been of a perishable nature, the assured would have been entitled to recover as for a total

loss. Here, the principal point is that which has been relied on by my Lord Chief Justice, *viz.* that the underwriters, from the length of time that intervened between the notice of abandonment, to the time of forbidding the sale of the wines, must be considered as having acquiesced in such abandonment; and the case of *Smith* v. *Robertson* is in point to shew what shall amount to an acceptance of an abandonment by underwriters. It has been contended however, that here they never adopted the abandonment; but it appears that, although notice was given of it by the assured on the 23d *December*, and they called a meeting for the 27th, the underwriters did nothing to repudiate it until the last day of *February* following. From so long a silence therefore, it must be presumed that they acquiesced in the abandonment. It is perfectly clear that the law imposes a duty on the assured to give an immediate or reasonable notice of abandonment if he intends to do so; and it is but equal justice that the underwriter should declare whether he would elect to accept it or not, as early as possible after such notice has been received. If after the notice, the underwriter agrees to accept the abandonment, it is his duty to send an agent to act for the best, and for the benefit of all concerned. If however, he refuses to accept it, the assured may consult with his friends, and exercise his judgment, whether it be better to continue the voyage, or proceed against such underwriter as for a total loss. Where an obligation is imposed on the one side, there ought to be a corresponding one on the other; and if the assured be bound to give notice of abandonment within a reasonable time, so an underwriter should state whether he would accept or reject it, at his earliest convenience after such notice has been given. In *Smith* v. *Robertson*, the Lord Chancellor seems to have been dissatisfied with the decisions in the cases of *Bainbridge* v. *Neilson* and *Falkner* v. *Ritchie*; and although *Smith* v. *Robertson* was afterwards decided on a collateral point, *viz.* the acceptance of the abandonment

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by the underwriters, yet his Lordship, after having directed a second argument, said (*a*), "an election might, it was contended, be made in cases of insurance, to abandon, or to take the chance of re-capture, and claim for a partial loss; but there it was said, that the underwriters had made their election, and that this was founded on their right to do so; and that at the time they claimed they had the right, because a present demand could not properly be made without a present right; and that if there was a present right, there was a corresponding obligation to accede to it *de præsenti*." His Lordship therefore, evidently supposed that it was an obligation imposed on the underwriter to say at the earliest opportunity whether he would accept the abandonment or not; and in the conclusion of his judgment on a subsequent day observed (*b*), that "although he had at one time intimated that it would be proper to have that case re-heard, that he since had had an opportunity of considering it with great attention, and of consulting with Lord *Redesdale*, and that the conclusion to which he had come was this;—that without intimating in the least what might have been the decision if the cases of *Bainbridge* v. *Neilson* and *Falkner* v. *Ritchie* had come before the house, and protesting against being considered as giving any opinion, agreeing or not agreeing with those decisions, it was clear that *Smith* v. *Robertson* was out of the principle of those cases; for it was not made out that the underwriters had any right whatever to refuse to settle as for a total loss, and that they could not be allowed to say that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss." On the same principle, I am of opinion that enough appears from the facts of this case to shew, that there was an acquiescence by the underwriters in the abandonment, from the length of time which elapsed from the day they received the notice; and it has been expressly found, that the assured acted for the best, and that the sale was for the interest of

(*a*) 2 Dow. 479.——(*b*) Id. 480, 1.

all concerned. This acquiescence, coupled with that circumstance, appears to me to have completed the right of abandonment, the consequence of which is, that the verdict found for the plaintiffs must stand.

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Mr. Justice BURROUGH.—Most of the cases which have been decided on the subject of insurance, depend upon their own peculiar circumstances; and here it has been admitted, that if the loss was at one period total, and continued so at the time of the notice of abandonment, the assured are entitled to recover; and I am of opinion that under the facts as stated, the loss was in its nature total. It appears that the ship was wrecked, and at high water the whole of the cargo was nearly covered; that the greatest part of it remained under water for about nine hours, between flood and flood, and that when part had been removed, the remainder floated in the vessel. The wreck took place on the 21st *December*, and the whole of the cargo was not taken on shore until six days afterwards. On the 23d, notice of abandonment was given, on which day the loss continued in the nature of a total loss, and the underwriters were then aware that the assured insisted on such loss, and intended to claim for it accordingly; and they followed the notice in the best manner they possibly could, by calling a meeting of the underwriters for the 27th. The defendant not having interposed, must be deemed to have been privy to the notice of abandonment, and the steps which had been taken by the assured. The meeting of the underwriters was accordingly had at *Lloyd's*, and it must be allowed that this is the usual mode of proceeding in cases of this description; if not, it should have been so stated in the case. Three of them attended and authorised the plaintiffs to act as if there had been no insurance. It appears to me therefore, that the defendant is bound by what occurred at that meeting. They also empowered the plaintiffs to send a person to *Bristol*, at the expence of the underwriters to superintend the preservation of the

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cargo. There was an end of the insurance; and the case then states, that the plaintiffs accordingly sent a person there for that purpose, who acted *bonâ fide* for the interest of all concerned. If that evidence was not admissible, it should have been rejected at the trial. It also appears, that every thing was done for obtaining the best price for the wines; and that no intimation was given by the underwriters that they required them to be forwarded to their port of destination, or that they did not sanction the sale until the 28th *February* following. For more than two months therefore, the defendant, as well as the other underwriters, were altogether silent; and it was not until after the sale had been advertised, that the assured received notice from them that they did not sanction it, although they had never expressed any disapprobation of what had been done at *Lloyd's*. On the whole therefore, it appears that this case does not at all trench on those which have preceded it; and as it depends entirely on its own circumstances, I am quite clear that they are so far in favor of the plaintiffs, as to entitle them to recover as for a total loss. If the underwriters had intended to have rejected the abandonment, they should have acted immediately, or at least within a reasonable time after the meeting at *Lloyd's*; and as they have not done so, they must be taken to have acquiesced in it.

Mr. Justice RICHARDSON.—I think that in this case there was such a loss, as to give the assured a right of abandonment at the time; that such right has not been divested by subsequent circumstances, and consequently that the plaintiffs are entitled to recover as for a total loss. In *Mitchell* v. *Edie* (*a*), Mr. Justice *Ashhurst* said, that "he apprehended the general rule was, that where any part of the property insured has been saved, the assured cannot recover as for a total loss, unless he make his election to abandon, and give reasonable notice to the underwriter of

(*a*) 1 Term Rep. 613.

his intention;" and Mr. Justice *Buller* observed (*a*), that "he was of the same opinion, and that where the voyage is lost, but the property saved, the owners have an option to abandon; but that unless they do elect to abandon, it is only an average loss." The same principle was stated in *Manning* v. *Newnham*, although, perhaps, the doctrine in that case cannot be adopted to its full extent, as it has been narrowed by recent decisions, by which it has been determined, that the mere retardation of a voyage is not sufficient to warrant an abandonment. That was expressly held in the case of *Anderson* v. *Wallis*, where Lord *Ellenborough* observed (*b*), that "disappointment of arrival was a new head of abandonment in insurance law; and that if the retardation of a voyage be a cause of abandonment, the happening of any marine peril to the ship, by which a delay is caused in her arrival at the earliest market, would be also a cause of abandonment." Still however, there are cases in which there may be such a loss of voyage as will authorise an abandonment. This appears to have been admitted by Lord *Ellenborough* and Mr. Justice *Bayley*, in *Hunt* v. *The Royal Exchange Assurance*, the former of whom had mainly contributed to narrow the old doctrine relative to abandonment. Nearly all the previous cases were there referred to, and a distinction was made by the Court between goods of a perishable and imperishable nature; and that if the cargo had been of the former description, it was said that it would not have been a retardation only, but a destruction of the thing insured; and it appears to me that under the facts of this case, this is a loss of that description; for on the 23d *December*, when notice of abandonment was given, the ship was on shore on her side, exposed to the operation of the wind and tide, and at high water the whole of the cargo was immersed in the sea, and it was uncertain whether she might not perish at the rise of every tide; and it cannot be contended but that those circumstances fully justified such no-

(*a*) 1 Term Rep. 615.——(*b*) 2 Maul. & Selw. 247.

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tice. Endeavours were made at a great expence, to save her cargo, which was taken through a hole cut in her side, afterwards removed into lighters, and landed and warehoused at *Bristol*; but in the result it appears, that three-fourths of the cargo was either spoiled or lost, for several casks were missing, others were empty, and the greater part of the wines had either leaked out or were impregnated more or less with salt water; and one-fourth only was found really sound or full, and in the opinion of all the witnesses, it appeared to be the best, and for the benefit of all concerned, to finish the adventure, and sell the cargo so circumstanced at *Bristol*. These circumstances therefore, appear to me to amount to a total loss of the voyage; and that although there was a partial recovery of one-fourth part of the cargo, the assured were warranted in giving the notice of abandonment, as it was not prudent for them to have prosecuted the voyage further. It is material to observe, that such part of the wines as were damaged by the salt water, must have become in a more deteriorated state by delay, or by sending them to *Ireland*, their final port of destination. I fully agree with the Court in thinking, that if the underwriters had intended to resist the abandonment, of which they had due notice, they should have been more prompt in rejecting or repudiating it, and not have waited two months after a meeting had been called on the subject. It was then too late for them to require the prosecution of the voyage; and more particularly so, as it does not appear whether it could have been done with prudence or advantage in the first instance. They must therefore be taken to have acquiesced in the abandonment, and consequently there must be

Judgment for the plaintiffs.

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FITCHLEY and Wife, Plaintiffs; JERVIS, Deforciant.

Wednesday, Nov. 21.

If documents for passing a fine be mislaid in the cursitor's office, the Court will allow it to pass, although one of the conusors be dead, and the acknowledgment was taken more than twelve months before the application was made; on an affidavit stating the time of the death of such conusor.

MR. Serjt. *Lens* moved that this fine might pass, notwithstanding the acknowledgment had been taken more than twelve months since. He founded his motion on an affidavit which stated, that the documents for passing it had been left at the cursitor's office in *Michaelmas* Term, 1820, and that the acknowledgment had been taken on the 14th *July* preceding; that one of the conusors died in *April* last, and that the papers had been mislaid at the cursitor's, and were not found till the latter end of *August*.

The learned Serjeant observed, that although by the rule of Court, *Easter* Term, 36 *Geo.* 3 (*a*), no fine which appears to have been acknowledged more than twelve months, can pass the King's silver office without a rule or order of the Court, still that it might be done on motion, though the conusors should not be living, on an affidavit stating the time of their death; and that the requisites of that rule had been here fully complied with.

The Court observed, that complaints had frequently been made at chambers, that papers relating to fines, left at the office of the cursitor, had been either lost or mislaid, which was productive of great inconvenience to the parties; and they ordered, that in future they should be properly arranged there, and trusted that an application of this description would be never again made.

Fiat.

(*a*) 1 Bos. & Pul. 530.

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FULLER *v.* ABRAHAMS and Others.

Where the plaintiff, on the sale of a barge by auction under an execution, addressed the company, stating that he had built it for the person against whom the execution was issued, who had not paid him for it; on which no person bid against him, but the auctioneer refused to knock it down to him at his first bidding, when a friend of his made another bidding, and the plaintiff advanced one shilling more, and paid a deposit in part of the purchase money:— Held, that he did not acquire any property in the barge under such sale.

THIS was an action of trover for a barge, which had been built by the plaintiff for a person of the name of *Bradshaw*. At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last *Hilary* Term, it appeared that the barge had been taken in execution by the sheriff for a debt due from *Bradshaw* to one *Humphreys*, and that it had accordingly been put up to sale by auction under the execution; that the plaintiff attended such sale, and stated to the company, that *Bradshaw* had not paid him for the barge; that he had used him very ill; and he appealed to their feelings, whether it was not a great hardship on his part; and that it would be a pity to bid against a poor man. The barge, however, was put up at 50*l.* on which the plaintiff bid 52*l.* and no one appearing to bid against him, the auctioneer refused to knock it down to him; on which a friend of the plaintiff's bid one guinea more, and the plaintiff advanced another shilling, when it was knocked down to him, and he paid 15*l.* deposit in part of the purchase money. It was also proved, that the barge, at the time of the sale, was worth 150*l.*; that the defendant *Abrahams* was the auctioneer, and that he afterwards declared it was not a fair sale; that the barge was afterwards re-sold by him under the order of *Humphreys*, when she fetched one hundred guineas.

His Lordship intimated a strong opinion, that under the circumstances, the sale to the plaintiff could not be considered as a valid sale, but left it to the Jury whether it was so or not; and they found a verdict for the plaintiff.

Mr. Serjt. *Vaughan*, in the last *Easter* Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial

granted, on the ground that the sale to the plaintiff was invalid and unfair, and that the verdict was directly contrary to the opinion of his Lordship who tried the cause.

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Mr. Serjt. *Pell* now shewed cause, and submitted, that the plaintiff was entitled to retain his verdict; first, as it did not appear that the deposit he had paid at the sale had ever been returned to him; secondly, as by the terms of the conditions of sale, the barge was to be at the risk of the purchaser immediately after the sale: if, therefore, she had been damaged or lost after the sale took place, the plaintiff alone would have been liable to such loss, and the seller might have called on him for the remainder of the purchase-money; thirdly, that there was no fraud whatever adopted by the plaintiff at the sale, although it was improper in his making representations so as to prevent others from bidding; that it did not appear that he had employed any person to bid for him; and that it was extremely hard that the barge should be taken from him when he had received nothing for it from the person for whom he had built it. If the auctioneer thought that the representations made by the plaintiff deterred others from bidding, he should not have proceeded with the sale; instead of which he took the chance of other persons bidding, and the barge was eventually knocked down to the plaintiff. At all events the verdict is not against law, and whether the sale was valid or not, was a mere matter of fact for the Jury to determine; and as there was no fraud or connivance proved against the plaintiff, such verdict cannot now be disturbed.

Mr. Serjt. *Vaughan*, in support of the rule, was stopped by the Court.

Lord Chief Justice DALLAS.—I certainly left the question to the Jury, whether the plaintiff purchased the barge at the sale fairly or not. I thought at the time that he had not,

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and still continue of the same opinion. The plaintiff appealed to the feelings of the company collected at the auction, and said that he had not been paid for the barge; that he was nearly ruined, and remarked that it would be a pity that any one should bid against him. The auctioneer afterwards said that in his opinion it was not a fair sale, and that he could obtain no bidding against the plaintiff's first offer, until a friend of his bid another guinea, and said to the plaintiff, "now *Fuller*, go on, and they must deliver the barge to you;" that the plaintiff then bid another shilling, on which it was knocked down to him. Under these circumstances, notwithstanding the Jury have found a verdict for the plaintiff, I think it cannot stand, and consequently that there must be a new trial.

Mr. Justice BURROUGH.—It would be too much to allow the plaintiff to avail himself of his own trick. If a person employ puffers to bid for him at an auction, it is a fraud and invalidates the sale, so that the purchaser cannot be compelled to complete the contract; that was decided in *Howard* v. *Castle* (*a*). Here the plan adopted by the plaintiff was worse than employing puffers; for after he had appealed to the feelings of the company, it appeared that none of them would bid against him; and when the auctioneer refused to knock down the barge to him on his first bidding, one of his friends advanced a guinea; and on the plaintiff's bidding one shilling more, it was the duty of the auctioneer to knock the article down to him, as being the highest bidder. Besides, it appears that the verdict of the Jury was directly contrary to the opinion of his Lordship who tried the cause.

Rule absolute.

(*a*) 6 Term Rep. 642.

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PATTERSON *v.* BECHER.

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In an action by the payee against the drawer of a bill of exchange, the declaration stated that the latter drew it at "*St. Helena*, to wit, at *Westminster*," and did not aver a protest either for non-acceptance or non-payment. On the production of the bill, it was dated at *St. Helena*, and not stamped:— On an objection that it was inadmissible as an inland bill, for want of such stamp, and that the plaintiff had given no evidence of a protest for non-acceptance or non-payment: Held, that as there was evidence of a subsequent promise by the defendant to pay the amount of the bill, coupled with a letter written by his attorney, offering terms for payment, it was a waiver of those objections, although such attorney swore that such offer was made without prejudice.

THIS was an action of *assumpsit* brought by the plaintiff as the payee, against the defendant as drawer of a bill of exchange. The declaration stated that the latter, on the 7th *June*, 1820, at *St. Helena*, to wit, at *Westminster*, in the county of *Middlesex*, drew the bill, and directed it to Messrs. *Nash* and *Co. London*, and thereby required them ninety days after sight, to pay the sum of 78*l.* to the plaintiff, or order, for value received. The plaintiff then averred, that when the bill became due, it was presented to Messrs. *Nash* for payment, but that they refused to pay the same; by means whereof the defendant became liable to pay its amount to the plaintiff. To this was added the common money counts; and the defendant pleaded the general issue.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after the last *Hilary* Term, the bill was produced in evidence, dated at *St. Helena*, but without a stamp. The plaintiff proved the hand-writing of the defendant, as well as a subsequent promise by him to pay the amount of the bill; and for the latter, evidence was adduced, which tended to shew that such promise, if any, was made without prejudice; and it was objected for him, that the declaration contained no averment of the bill's having been drawn abroad, "*St. Helena*" not having been stated to be "in parts beyond the seas," so as to enable the defendant to object to a want of protest upon special demurrer (*a*); that it must therefore be presumed that the bill declared on was an inland bill, and if so, the instrument produced would vary from that set out in the declaration, and that if it was considered an inland bill, it was inadmissible for want of a stamp.

(*a*) See *Salomons* v. *Stavely*, 2 Doug. 684 (n.)

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His Lordship was of opinion, that the subsequent promise by the defendant to pay, might amount to a waiver of those objections, and supersede the necessity of any further proof as to the presentment or protest for non-payment, those facts not having been averred in the declaration; and the Jury accordingly found a verdict for the plaintiff, for the full amount of the bill, but leave was given the defendant to move for a nonsuit, in case the Court should be of opinion that those objections were well founded.

Mr. Serjt. *Lens*, in the last *Easter* Term, obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, or a new trial granted; and submitted, that unless a bill be stated in a declaration to be made in foreign parts, the Court cannot assume that it was so (*a*), and that the instrument in question was void for want of a stamp. If it were a foreign bill, it should have been protested, and the protest proved, for the protest is the essence of such bill, and if it be omitted to be stated in the declaration, it is matter of special demurrer only (*b*). If the form of the declaration in this action be good, it will in no case be necessary to aver a protest. At all events, as it was brought against the defendant as drawer, the protest should have been proved (*c*). With respect to the acknowledgment, it has been decided in *Blesard* v. *Hirst* (*d*), and *Goodall* v. *Dolley* (*e*), that if the indorsee of a bill present it for acceptance, which is refused, and delay giving notice to his indorser, the latter will be discharged; and that a subsequent proposal by him to pay the bill by instalments, made without the knowledge of the indorsee's laches, was not a waiver of the want of notice. Here the subsequent promise was to pay the amount of a bill generally; and whether it was that stated in the declaration or not, is matter of evidence only, and as it was not

(*a*) See *Kearney* v. *King*, 2 Barn. & Ald. 301. S. C. 1 Chit. Rep. 28. (*b*) See Chitty on Bills, 5th edit. 465.——(*c*) See *Gale* v. *Walsh*, 5 Term Rep. 239.——(*d*) 5 Burr. 2670.——(*e*) 1 Term Rep. 712.

properly described or set forth therein, the plaintiff cannot be entitled to recover.

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Mr. Serjt. *Vaughan* now shewed cause, and contended, that although there was contradictory evidence as to the subsequent promise by the defendant, as it was made in a conversation which took place between him and the plaintiff's attorney, still, that on the same day, the attorney for the defendant wrote a letter to the latter, stating, that since he had the pleasure of seeing him that morning, he had waited on the defendant, and advised with him respecting the plaintiff's demand; and that he then, on the defendant's behalf, proposed to give a warrant of attorney for the amount, payable in three months, being the earliest period that he could with any degree of certainty fix for the payment of the same. The learned Serjeant was proceeding with his argument, when he was stopped by the Court—who called on

Mr. Serjt. *Lens* to support the rule.—The defendant is not precluded from making any legal objections by the terms of that letter, either as to the insufficiency of the declaration, or the want of proof of the protest at the trial. It was written after the action was brought, and subsequently to the conversation which had taken place between the defendant and the plaintiff's attorney, and at which the attorney for the former swore that the offer was made without prejudice. The letter not only had reference to that conversation, but was written for the purpose of endeavouring to arrange matters agreeably between the parties, and must therefore be taken to have been made without prejudice, as well as the previous offer.

Lord Chief Justice DALLAS.—It was objected for the defendant at the trial, that if this were to be considered as a foreign bill of exchange, the plaintiff could not recover

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against the defendant as drawer, as he had not caused it to be protested either for non-acceptance or non-payment; and that if it were an inland bill, it would be void for want of a stamp. Although I gave the defendant leave to move that a nonsuit might be entered, I still thought that enough appeared from the conversation which took place between the defendant and the attorney for the plaintiff, to amount to a sufficient waiver of those objections. Although the attorney for the former, who was present, said, that if any offer was made, it was without prejudice; still from the terms of the letter written by him, I have no doubt but that it amounted to such waiver. Neither he nor the defendant denied that the amount of the bill was not due to the plaintiff; and in *Lundie* v. *Robertson* (*a*), it was held, that a subsequent promise by an indorser is a waiver of the objection for want of notice; and in *Jones* v. *Morgan* (*b*), where that case was recognized, it was decided, that a promise to pay after a bill is due, is a sufficient admission of the acceptance, as well as of the hand-writing of the drawer, and of the other parties to the bill. So here, I think the letter written by the defendant's attorney, coupled with the previous conversation, is a waiver of the objection of the want of proving the protest at the trial.

Mr. Justice PARK.—It is quite clear that it is not necessary to aver the protest in the declaration; it is sufficient if it be proved; and even if the objection made by the defendant was valid, I think it has been waived by his subsequent conduct; at all events it was a mere technical objection.

Mr. Justice BURROUGH.—Neither the defendant nor his attorney ever denied that the debt for which the bill was given, was not due to the plaintiff. The declaration is not bad in substance; for although it was a foreign bill, it would

(*a*) 7 East, 231.——(*b*) 2 Camp. 474.

have been sufficient for the plaintiff to have proved a protest for non-acceptance or non-payment; and it appears to me that the want of such protest has been clearly waived by the conversation which took place between the parties; and the proposition afterwards made by the attorney of the defendant in his letter.

Mr. Justice RICHARDSON.—Even if the instrument in question had been properly declared on as a foreign bill, it has been decided in the case of *Rogers* v. *Stevens* (*a*), that a promise to pay after a bill or note becomes due, will dispense with proof of presentment, and notice of dishonor. So it will dispense with the proof of protest, as it will amount to an admission on the part of the defendant, that the plaintiff had a right to resort to him upon the bill. So in *Legge* v. *Thorpe* (*b*), it was held, that if the drawer of a foreign bill of exchange had no effects in the hands of the drawee, and had no reasonable grounds to expect that the bill would be honoured; a protest is unnecessary to charge such drawer. Independently of this it appears to me, that the letter written by the defendant's attorney was of itself a waiver of the necessity of proving such protest at the trial.

Rule discharged (*c*).

(*a*) 2 Term Rep. 713.——(*b*) 2 Camp. 310. S. C. 12 East, 171.

(*c*) In *Gibbon* v. *Coggon* (*), which was an action against the drawer of a foreign bill of exchange, it was determined, that a promise of payment by the defendant after the bill was due, is sufficient evidence of a protest for non-payment, and notice of the dishonor of the bill; and Lord *Ellenborough* there said, "By a promise of the drawer to pay, he admits his liability; he admits the existence of every thing which is necessary to render him liable. When called upon for payment of the bill, he ought to have objected that there was no protest; instead of that, he promises to pay it. I must therefore presume, that he had due notice, and that a protest was regularly drawn up by a notary."

(*) 2 Camp. 188.

1821.

Thursday, Nov. 22.

HOUSE *v.* The TREASURER to the COMMISSIONERS of the THAMES and ISIS NAVIGATION.

Where the plaintiff's cause of action is altogether denied by the defendant's pleas, and at the trial the plaintiff obtains a verdict on some issues, and the defendant on others, the plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial, but not the costs of the issues found for the defendant, on which, however, the latter is not entitled to claim any costs from the plaintiff; but where the defendant suffers judgment by default as to some causes of action, and pleads as to others, and the plaintiff takes issue on the pleas, and at the trial all the issues are found for the defendant, the latter is entitled to the costs of the issues found for him, and the plaintiff to those only of the judgment by default. Where, therefore, to an action of trespass, the defendant pleaded the general issue to the whole declaration, and several special pleas as to part, and the plaintiff new assigned, and the defendant suffered judgment by default as to the new assignment, and the plaintiff was bound to go to trial to get rid of the general issue, which would otherwise have barred his whole action, and he could not by any other means have obtained damages on the judgment by default:—Held, that the plaintiff was entitled to the general costs of the cause, including those of the trial, although the Jury found a verdict for the defendant on one of the special pleas, the costs of such issue being deducted, but not allowed to him on that issue.

THIS was an action of trespass. The first count of the declaration stated, that the Commissioners broke and entered five named closes, and four others unnamed, of the plaintiff, and trod down the grass, subverted and took away the soil thereof, and disposed thereof to their own use. The second count stated, that they broke and entered two other named closes, and two unnamed, and cut down trees therein, and converted the same to their own use. The third count stated, that they broke and entered one close therein named, and another covered with water, and drove a pile into that which was named, by which it was greatly encumbered and injured. The fourth count stated, that they broke and entered seven closes therein specified, and four others unnamed, and expelled the plaintiff from the possession of them, and took away the soil thereof, and converted it to their own use. The defendant, as treasurer to the Commissioners (*a*), pleaded first, not guilty to the whole declaration. Secondly, as to the closes named in the first, second, and third counts, and also as to the taking away the

(*a*) By 28 *Geo.* 3. *c.* 51. *s.* 3, actions are to be brought against the treasurer for the recovery of damages, or obtaining a recompence for any injuries suffered by any of the works, for the better carrying on the navigation, or by executing any orders or resolutions of the commissioners.

soil in the last count, that one *Sambrooke Freeman* being seised in fee of a certain piece of land, comprising the closes in that plea mentioned, before the plaintiff had any thing therein, granted to the Commissioners full licence to erect a pound-lock for the use of the navigation; that they afterwards erected the same in consequence of such licence, and justified the trespasses for the purpose of repairing the lock. Thirdly, as to the closes named in the first, second, and third counts of the declaration, that the Commissioners were seised in fee by virtue of a deed of bargain and sale from *Freeman* to them. Fourthly, that the Commissioners, as to the closes named in the first, second, and third counts, were seised in their demesne as of fee, for the purposes and use of the navigation:—and lastly, as to the closes not named in the first and second counts of the declaration, *liberum tenementum*. The plaintiff in his replication took issue on the first plea of not guilty, and traversed the licence mentioned in the second. He also took issue on the third and fourth pleas, entered a *nolle prosequi* as to the unnamed closes in the last plea of *liberum tenementum*, and newly assigned to the second, third, and fourth, that the Commissioners on other occasions than those in such pleas mentioned, and in a greater degree than was necessary for the purposes therein mentioned, and also on other and different parts of the said closes, in which, &c. than was necessary or proper for the purposes in those pleas mentioned, committed the several trespasses in the introduction of and by such pleas attempted to be justified. The defendant, by his rejoinder, took issue on the traverse of the licence, for the purposes of repairing the lock in the second plea mentioned, and suffered judgment by default to the new assignment. The cause went down as well to try the issues joined between the parties, as to assess the plaintiff's damages on the new assignment.

At the trial before Mr. Justice *Park*, at the last Spring Assizes at *Reading*, the third and fourth pleas as to the grant from

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Freeman, and the Commissioners being seised in fee for the purposes of the navigation, were abandoned by consent, and the Jury were discharged from giving any verdict thereon. They found a general verdict for the plaintiff on the plea of not guilty, without assessing any damages thereon; and for the defendant on the second special plea of licence: and they assessed the plaintiff one shilling damages, and one shilling costs on the new assignment, to which the defendant had suffered judgment by default; and the learned Judge certified under the statute 8 & 9 *Will.* 3. *c.* 11. *s.* 4, that the trespass was wilful and malicious, as it was committed after due notice had been given to the Commissioners, and the Jury thought they had been guilty of a great excess. The Prothonotary having allowed the defendant the costs of the issue found for him on the plea of licence,

Mr. Serjt. *Peake*, in the last Term, obtained a rule *nisi*, that he might tax the plaintiff his full costs of the cause, deducting therefrom the costs of the issue found for the defendant, but not allowing him any costs on that issue. He submitted, that the plaintiff was entitled to have his costs so taxed on the legal result of the verdict, as well as on the ground that he was obliged to go down to trial on the plea of not guilty, on which he had obtained a general verdict; besides which, the learned Judge had certified that the trespass was wilful and malicious. He relied on the case of *Trotman* v. *Holder* (*a*), as being precisely in point, with the exception, that there, issue was joined on the new assignment, whilst here, the defendant had suffered judgment by default. He also cited *Martin* v. *Vallance* (*b*).

Mr. Serjt. *Lawes* afterwards shewed cause, and submitted, that the Prothonotary had been perfectly right in his taxation, and that the plaintiff was not entitled to his full costs, not-

(*a*) Ante, vol. iii. page 555. S. C. 1 Brod. & Bing. 222.——(*b*) 1 East, 330.

withstanding the verdict found for him on the plea of not guilty, and the certificate of the learned Judge who tried the cause. In *Trotman* v. *Holder*, and *Martin* v. *Vallance*, the pleadings were altogether different, and issues were taken in both on the new assignment; but here, as the defendant had suffered judgment by default, there was no necessity for the plaintiff to take down the record as in those cases. [Mr. Justice *Richardson*.—The defendant has pleaded not guilty to the whole of the declaration; it was therefore necessary for the plaintiff to go down to trial to get rid of that plea, and prove some of the trespasses as laid.] In *Thornton* v. *Williamson* (*a*), which was an action of trespass for breaking and entering the plaintiff's messuage, and the defendant pleaded, first, not guilty as to the force and arms, &c.; and secondly, as to the residue, a justification of a right of way over the *locus in quo* at all times; and thirdly, a like justification in the day-time; and the plaintiff in his replication took issue on the two rights of way, and new assigned *extra viam*, &c. to which there was judgment by default: and after verdict for the plaintiff on the first special issue for one shilling, and damages assessed also on the new assignment, and a verdict for the defendant on the not guilty, except, &c. and on the second special issue;—it was held, that the defendant was entitled to the general costs of the trial; because the plaintiff was not obliged to go to trial, but should have let judgment go by default on the issue upon the limited right of way, which was found against him; and then if the cause had gone to trial only on the issue as to the general right of way claimed by the defendant at all times; the plaintiff succeeding on that issue, would have been entitled to the general costs of the trial; and in *Lee Compere* v. *Hicks* (*b*), where a declaration in trespass contained two counts, and the defendant pleaded to one, and suffered judgment by default as to the other; and on the trial of the first, the plaintiff proved one act of tres-

(*a*) 13 East, 191.——(*b*) 7 Term Rep. 727.

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pass only, which was covered by the second count, he was held not to be entitled to a verdict on the first. Here, the certificate that the trespass was wilful, cannot operate against the defendant, as it only applies to cases in which issue is joined, and not to those where a judgment has been suffered by default; for the statute of *Glocester* (*a*) only gives the plaintiff costs where the party is to recover damages. So the 22 & 23 *Car.* 2. *c.* 9, is confined to damages to be found by a Jury; and although the restraint put upon the plaintiff's general right to costs by that statute, was in a great measure taken off by the statute 8 & 9 *Will.* 3. *c.* 11. *s.* 4, in cases of wilful trespasses, still, that clause must be confined in its operation to trespasses on which issue is joined, and on which damages may be given at the trial. Here, therefore, although the Jury found a verdict for the plaintiff on the plea of not guilty, still, as no damages were assessed under it, the certificate cannot be available as against the defendant.

Mr. Serjt. *Peake* in reply. In *Thornton* v. *Williamson*, the defendant pleaded not guilty as to part only, on which a verdict was found for him, as well as upon the second special issue upon the limited right of way, and damages were assessed for the plaintiff on the new assignment. Here, however, the defendant pleaded not guilty to the whole of the declaration, by which he compelled the plaintiff to go down to trial. Although the statutes of *Glocester* and the 22 & 23 *Car.* 2. *c.* 9, restrain the plaintiff's right to recover more costs than damages, unless the Judge certifies at the trial, and although the latter statute may apply only to trespasses of which the defendant may be found guilty, yet the 8 & 9 *Will.* 3. *c.* 11, extends to all wilful and malicious trespasses whatever. The cases of *Trotman* v. *Holder*, and *Martin* v. *Vallance*, were decided on the authority of *Asser* v. *Finch* (*b*); and in *Postan* v. *Stanway* (*c*), it was deter-

(*a*) 6 *Edw.* 1. *c.* 1.——(*b*) 2 Lev. 234.——(*c*) 5 East, 261.

mined, that where to different counts of a declaration, there are different pleas, and issues on those pleas, and one or more found for the plaintiff, and the others for the defendant, the latter shall not have costs taxed upon the issues found for him. Although in *Day* v. *Hanks* (*a*) it was held, that if there be two distinct causes of action in two separate counts, and as to one the defendant suffers judgment to go by default, and as to the other takes issue and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment and costs on the first count; yet there the Court were bound to give two distinct judgments, as the plaintiff had succeeded on one cause of action, and the defendant on the other, whilst here, the latter has suffered judgment by default as to the new assignment, and the plaintiff has obtained a verdict on the general issue, which went to the whole cause of action. So in *Griffiths* v. *Davies* (*b*), where the declaration was in trespass, and consisted of one count only, to which there were several pleas of justification on which issues were taken, and a new assignment, as to which judgment passed by default, and a *venire* was awarded, as well to assess the damages on the judgment by default, as to try the issues; all the issues being found for the defendant: he was held to be entitled to the costs of them. There, however, the general issue was not pleaded, and *all* the issues were found for the defendant. Here the Jury have not only found a verdict for the plaintiff on the general issue, but assessed him damages on the new assignment. He is therefore entitled to the costs of the cause, independently of the certificate. The defendant, after the plaintiff had new assigned, should have withdrawn the general issue; and as he did not do so, he compelled the plaintiff to go down to trial, who is consequently entitled to his full costs, deducting only the costs of the issue found for the defendant on the second plea. *Cur. adv. vult.*

(*a*) 3 Term Rep. 654.——(*b*) 8 Term Rep. 466.

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Lord Chief Justice DALLAS on this day, after briefly recapitulating the pleadings and the result of the trial, delivered the judgment of the Court, as follows:—

The cases of *Postan* v. *Stanway*, *Trotman* v. *Holder*, *Day* v. *Hanks*, *Griffiths* v. *Davies*, and other cases, seem to have established a rule, that where the plaintiff's demand is altogether denied by the defendant's pleas, and at the trial the plaintiff obtains a verdict for part of his demand, and the defendant obtains a verdict as to the other part, the plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial; but do not include the costs of the issues found for the defendant, on which last mentioned issues however, the defendant is not entitled to claim any costs from the plaintiff:—but where the defendant suffers judgment by default as to part of the plaintiff's demand, and pleads only as to the other part, and the plaintiff takes issues on the pleas, and at the trial *all* the issues are found for the defendant; he is entitled to the costs of the issues found for him, and the plaintiff is entitled only to the costs of the judgment by default. This case appears to the Court to fall within the former part of the rule; for the defendant by pleading the general issue to the whole declaration, made it necessary for the plaintiff, in order to get rid of that plea, which would otherwise have barred his whole action, to go down to trial at the Assizes, and he could not by any other means have obtained damages or costs on the judgment by default. The plaintiff therefore, having obtained a verdict on the plea of the general issue, and an assessment of damages on the judgment by default, is entitled to the general costs of the cause, including those of the trial, the costs of the issue found for the defendant being deducted, but no costs being allowed to the latter on that issue. My Brother *Park* who tried the cause, certified under the statute 8 & 9 *Will.* 3, that the trespass was wilful and malicious; and it has been contended for the defendant, that such certificate cannot avail the plaintiff, as the statute does not apply to trespasses where judgment has

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gone by default, but must be confined to those on which a defendant may be found guilty at the trial; and that although the defendant in this case has been found guilty on the general issue, yet that it cannot operate as against him, because no damages were assessed under it. On this point however, it is unnecessary to give any opinion, as independently of the certificate, it appears that the plaintiff is entitled to the costs of the trial, as he could not obtain an assessment of damages on the judgment by default, without going to the Assizes, in consequence of the defendant's pleading the general issue to the whole declaration. The rule therefore, for the Prothonotary to review his taxation in this respect, must be made

Absolute (*a*).

(*a*) See *Harber* v. *Rand*, 9 Price, 336.

DOE, on the Demise of JOHNSON *v.* ROE.

Thursday, Nov. 22.

The Court will not refer it to the Prothonotary to take an account of monies received by the lessor of the plaintiff, in respect of annuities, or to ascertain the costs in an action of ejectment.

MR. Serjt. *Peake* moved for a rule to shew cause why it should not be referred to the Prothonotary to take an account of monies received by the lessor of the plaintiff on account of certain annuities, as well as to ascertain and settle the costs of this action, which had been brought for non-payment of rent.

But the Court observed, that they could not interfere; neither could the Prothonotary know what part of the annuities might remain unpaid; and that the only remedy was by an application to a Court of Equity; that this was not like the case of a mortgage secured by covenant (*a*), and that the statute 4 *Geo.* 2. *c.* 28. *s.* 4, provides for cases of ejectment for non-payment of rent (*b*).

The learned Serjeant therefore took nothing by his motion.

(*a*) See *Berthen* v. *Street*, 8 Term Rep. 326.——(*b*) See *Doe*, d. *Harcourt* v. *Roe*, 4 Taunt. 883.

Friday, Nov. 23.

PIESSE *v.* GIBSON,

Notice of bail, as residing at "*Clapham*," is sufficient if he live in the *Clapham* Road.

MR. Serjt. *Pell* opposed the justification of one of the bail in this cause, who was described in the notice as of "*Clapham*, in the county of *Surrey*." He submitted that it was an insufficient description, and relied on the case of *Rickman* v. *Hawes* (*a*), where the Court held, that the description of "*Clapham*," was too general; but as it appeared that the bail resided in the *Clapham* Road,

The Court allowed him to justify, as he did not live in a *lieu conus* within the village.

(*a*) 5 Taunt. 173.

Friday, Nov. 23.

FITZGERALD *v.* BOEHM.

An action of *assumpsit* cannot be maintained by a surviving executor in his own right, against the surviving partner of a deceased co-executor, without stating him to be a surviving partner. Where, therefore, the plaintiff and *J.T.* were appointed co-executors, and the latter was in partnership with the defendant, and died leaving the plaintiff surviving, and *J.T.* had paid large sums belonging to the testator's estate into the partnership account, which were placed to the general credit of the estate of the testator, and the defendant and *J.T.* became insolvent, and none of the funds ever came to the plaintiff:—Held, that he could not recover from the defendant in an action for money had and received, commenced by him in his own right, against the defendant in his own right, and not describing him as surviving partner of *J. T.*

THIS was an action of *assumpsit* for money had and received. The declaration contained all the money counts, as well as a count for interest. The defendant pleaded the General Issue.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last *Hilary* Term, a verdict was found for the plaintiff, damages 15,495*l.* 4*s.* subject to the opinion of the Court, upon the following case:—*William Leamy* died in *March*, 1815, possessed of very

considerable property, and by his will dated the 24th *March*, 1814, appointed the plaintiff and *John Taylor*, co-executors, who duly proved the same. At the time of the decease of the testator, *Taylor* the co-executor was in co-partnership with the defendant, and so continued until *February* 15th, 1819, when the business of the partnership was discontinued; after which, and before any adjustment or liquidation of the accounts of the firm, *viz.* in *January* 1820, *Taylor* died, leaving his co-executor the plaintiff, him surviving. *Taylor*, in his life-time, and during the continuance of the partnership, paid from time to time divers large sums into the house of *Boehm* and *Taylor*, belonging to the testator's estate, and of which a separate account was kept in the partnership books to the credit of the said estate of *Leamy*. 13,000*l.* part of the sum recovered by the verdict, was paid into the house of *Boehm* and *Taylor*, by a bill drawn at, and transmitted from *Madras* by *Bunny* and *Co.*, accepted by *Fairlie*, *Bonham* and *Co.*, of *London*, and specially indorsed to the plaintiff and *Taylor* as executors of the testator, by the drawers, for a debt due from them to the testator, and which bill was duly paid by the acceptors. Neither the bill, nor any part of the funds, ever came into the hands of the plaintiff, but were received by the partnership from *Taylor*, the co-executor, without the knowledge of or notice to the plaintiff, and were placed to the general credit of the estate of *Leamy*. In 1819 the house of *Boehm* and *Taylor* became insolvent. At the time of the dissolution of the partnership above stated, there appeared on the books a credit to the estate of *Leamy*, amounting to the sum recovered by the verdict, no part of which has been since paid. This action was commenced by the plaintiff, the surviving co-executor of *Taylor*, and he declared in his own right, and not as executor, against the defendant in his own right, and not as the surviving partner of *Taylor*. If the Court should be of opinion that the plaintiff was entitled to recover in this

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action, then the verdict was to stand for 15,495*l.* 4*s.* if not, a nonsuit was to be entered.

The case now came on for argument, when

Mr. Serjt. *Blosset*, for the plaintiff, submitted first, that he might declare in his own right, without stating himself as being the surviving executor of *Taylor*, as the action was brought to recover money to which both of the executors were entitled immediately after the death of the testator; and secondly, that it made no difference that *Taylor* was co-executor with the plaintiff, and co-partner with the defendant, as he was now dead. He referred to the cases of *Bosanquet* v. *Wray* (*a*), and *Jell* v. *Douglas* (*b*), the latter of which had been decided since this case was set down for argument, and where it was held, that in *assumpsit* by one of two surviving partners, the fact of the plaintiff being surviving partner, must be stated in the declaration. The learned Serjeant was proceeding with his argument, when he was stopped by

The Court, who observed, that *Jell* v. *Douglas* was undistinguishable from the present; and that the case of *Moffatt* v. *Van Millingen* (*c*), which was an action of assumpsit by several executors; a plea in bar, that the promises were made by the defendant jointly with one of the plaintiffs, was held good on demurrer; and Mr. Justice *Buller* there said, "the promise was made jointly with one of the plaintiffs; how can he sue himself in a Court of Law? It is impossible to say that a man can sue himself."

Judgment for the defendant (*d*).

(*a*) 2 Marsh. 319. S. C. 6 Taunt. 597.——(*b*) 4 Barn. & Ald. 374. (*c*) 2 Bos. & Pul. 124 (n.)——(*d*) Mr. Serjt. *Lens* was to have argued for the defendant.

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KELLY *v.* CLUBBE.

Friday, Nov. 23.

Debt does not lie for the arrears of an annuity issuing out of lands, and payable to the annuitant for life, although it is not stated in the declaration, that the grantor had a freehold in the premises out of which it was payable, as it must be inferred that he had such an interest, where nothing appears to the contrary.

THIS was an action of debt. The declaration stated, that on the 3d *April*, 1813, by a certain indenture, made between the defendant of the first part, and one *Sarah Clubbe* of the second, which said *Sarah* had since intermarried with, and then was the wife of the plaintiff; and one *John Jeys* of the other part, which, after reciting as therein was recited, the defendant, for the considerations therein mentioned, did give, grant, and confirm unto the said *Sarah* and her assigns, during the term of her natural life, a certain annuity or rent-charge of 200*l.* to be yearly issuing, payable and growing out of certain premises in the indenture particularly mentioned and described;—To have, hold, and enjoy the said annuity, unto and to the use of the said *Sarah* and her assigns, for her life, without any deduction or abatement whatsoever, in respect of any taxes, assessments, or payments imposed by authority of parliament or otherwise howsoever, or by reason of any other matter or thing whatsoever, except the property-tax; the same to be paid and payable by four quarterly payments, upon every 24th *June*, 29th *September*, 25th *December*, and 25th *March*, by even and equal portions. The plaintiff then averred, that after the making of the indenture, and after the marriage of the plaintiff with the said *Sarah*, and during her life, to wit, on the 25th *March*, 1821, the sum of 200*l.* for four quarterly payments of the said annuity or rent-charge, which ended and expired on the day and year last aforesaid, became payable, and still was in arrear and unpaid to the plaintiff, contrary to the force and effect of the indenture, and of the covenant of the defendant by him in that behalf made; and that he, during the whole of the said last-mentioned time, and since the intermarriage of the plaintiff, had received the whole of the rents, issues, and profits of the premises in the

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indenture mentioned, amounting to the sum last aforesaid, for the use of the plaintiff, whereby the defendant became liable to pay that sum to the plaintiff, when he should be thereunto afterwards requested. To this was added the common money counts. The defendant demurred specially to the first count, and assigned for causes, (among others), that although it is therein stated and alleged, that the said *Sarah Clubbe* hath intermarried with, and is now the wife of the plaintiff, and although it is stated that the defendant, by the said supposed indenture, granted to her and her assigns, during the term of her life, the said supposed annuity of 200*l.*;—To have, hold, and enjoy the same, unto and to the use of the said *Sarah* and her assigns for her life, yet it is not stated or alleged in the said count, that the said annuity hath ceased or been determined, or that the same doth not still continue; that the action of debt doth not lie to recover the arrears of any such annuity, so long as the estate of freehold therein hath continuance;—and also that it is not stated therein that the said *Sarah*, by virtue of the said supposed grant in the said indenture contained, became seised of the said supposed annuity, or that she continued seised thereof, until and at the time of her said supposed intermarriage with the plaintiff, or that he and she, on their intermarriage, became seised thereof; or how he became seised, or how the said supposed sum of money for the said supposed four quarterly payments of the annuity became due, owing, and payable to the plaintiff, as in the first count supposed. The plaintiff joined in demurrer, and the cause came on for argument this day, when

Mr. Serjt. *Hullock*, in support of the demurrer, was stopped by the Court, who called on

Mr. Serjt. *Onslow* to establish the plaintiff's declaration. He submitted, that this case was distinguishable from that

of *Webb* v. *Jiggs* (*a*), where it was held, that an action of debt does not lie for the arrears of an annuity or yearly rent devised payable out of lands to *A.* during the life of *B.*, to whom the lands were devised for life, *B.* paying the same thereout, so long as the estate of freehold continued. There it was averred, that the grantor of the annuity was seised as of freehold of the lands on which the annuity was charged; and it is clear that by the common law, debt is not maintainable for the arrears of a rent-charge or annuity in fee tail or for life, so long as the estate of freehold continues. Here, however, it does not appear on the face of the declaration, that the grantor had such an estate; but merely that the annuity was to be payable out of certain premises, to the plaintiff's wife for life. An annuity may be charged out of terms for years, as long leaseholds for 500 or perhaps 1000 years. So, an annuity for life may be granted out of a term for 99 years; and there is nothing contained in the declaration to shew, that the defendant had more than such an interest in the premises charged with the annuity. At all events, as it is alleged that since the intermarriage, certain arrears of the annuity had accrued, and that the defendant had received the rents and profits of the premises to the use of the plaintiff, the present action is sustainable on that allegation alone.

But, *Per Curiam.*—This case is not distinguishable, in point of principle, from that of *Webb* v. *Jiggs*, from the whole of the argument in which it must be inferred, that debt will not lie in a case like the present. The demurrer goes to the substance of the declaration; and although it is therein stated, that an annuity for life was granted out of certain premises, without averring that the grantor had a freehold interest therein, still, it must be presumed that he had such an interest, as nothing to the contrary appears. With respect to the allegation, that the

(*a*) 4 Maul. & Selw. 113.

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grantor received the rents of the lands to the use of the plaintiff, that is not so; for it is stated that the annuity was payable out of certain premises in the indenture particularly mentioned; and as it was granted for the life of the plaintiff's wife (the grantee), the grantor must be considered as having a larger interest than a term for years; and therefore the present action cannot be maintained.

Judgment for the defendant.

Monday, Nov. 26.

STEPHENS and Another, Assignees of MITCHELL, a Bankrupt, *v.* ROTHWELL and PARKINS, Sheriff of Middlesex.

In an action by the assignees of a bankrupt, founded on the statute 29 *Eliz. c.* 4, against a sheriff for extortion, on executing a *levari facias*, issued out of the Court of Exchequer for a crown debt: Held, that that statute applied only to cases between party and party, and that the plaintiff's remedy was under the statute 3 *Geo.* 1. *c.* 15. which gives the sheriff poundage, in cases where the debt is due to the Crown, previously to which he was not entitled to such poundage, except under orders issued by that Court. It seems that the taking a remuneration by the sheriff for extra expences incurred in dividing the property of a bankrupt into lots, at his request, in order that it might sell to greater advantage, does not amount to an extortion.

THIS was an action founded on the statute 29 *Eliz. c.* 4. for an alleged extortion by one of the defendants' bailiffs, who was employed to levy the bankrupt's goods, under a writ of *levari facias*, issued out of the Court of Exchequer, for a debt due from him to the Crown.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after the last Term, the trading of the bankrupt was admitted, and it appeared that the defendants were directed to levy the sum of 263*l.* 13*s.* 6*d.* under the writ, for penalties due from the bankrupt to the Crown, under a conviction for offences committed by him against the excise laws; that on the levy being made, he desired that his goods might be sold, and that time might be allowed for dividing them into lots for that purpose, as by that means they might be disposed of at a greater advantage, which indulgence the bailiff granted. The sum demanded by the defendants for proceed-

ing under the writ amounted to 27*l.* 9*s.* 6*d.* and consisted of the following items, *viz.*—21*l.* 6*s.* for the auctioneer's and other expences attending the sale; 5*l.* for a man employed to keep possession of the bankrupt's premises until the sale was effected; and 1*l.* 3*s.* 6*d.* for poundage, which latter sum had been taken by the officer, but afterwards returned to the bankrupt and retained by him.—For the defendants it was objected, that this action was not maintainable for extortion under the statute 29 *Eliz.* *c.* 4., as that statute applied only to debts as between subject and subject, and not to penalties due to the Crown; and that the plaintiffs' remedy, if any, was by an application to the Barons of the Court of Exchequer, to whom a jurisdiction was given in cases of this nature, by the statute 3 *Geo.* 1. *c.* 15. *s.* 3. (*a*), which is expressly applicable to all cases where debts are due to the Crown, and on which statute alone the sheriff was entitled to poundage. That as to the sum paid for keeping the person in possession, previous to the sale of the bankrupt's goods, it could not amount to an extortion, as it was received for something done which was collateral to

(*a*) By which it is enacted, that "all sheriffs, who shall levy any debts, duties, or sums of money, except *post* fines due to the king's majesty, his heirs or successors, by process to them directed upon the summons of the pipe or green wax, or by *levari facias* out of the Court of Exchequer, shall, from time to time, for their care, pains, and charges, and for their encouragement therein, have an allowance upon their accounts of twelve pence out of every twenty shillings, for any sum not exceeding one hundred pounds, so by them levied or collected, and the sum of six pence only for every twenty shillings, over and above the first one hundred pounds; and for all debts, &c. except *post* fines due to his majesty, his heirs and successors, by process on *fieri facias* and extent, issuing out of any of the offices of the Court of Exchequer, the sum of one shilling and six pence out of every twenty shillings, for any sum not exceeding one hundred pounds, so by them levied or collected; and the sum of twelve pence only for every twenty shillings, over and above the first one hundred pounds: Provided always, such sheriff shall duly answer the same upon his account, by the general sealing day of such Term in which he ought to be dismissed the Court, or in such time to which he shall have a day granted to finish his said accounts, by warrant signed by the Lord Chief Baron, or one of the Barons of the coif of the said Court for the time being, and not otherwise."

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the general duty of the officer, and was for the benefit of the bankrupt's estate, and done at his particular request; and lastly, that even if there had been an infringement on the statute of *Elizabeth* by the defendants, the action should have been brought by the bankrupt, and not by his assignees, he alone being the party grieved, within the terms of that statute. The Jury found a verdict for the plaintiffs, for 26*l*. 6*s*. being the amount of the sums charged for the expences of sale, and keeping the man in possession, thereby negativing the claim for poundage, as it was returned by the officer to the bankrupt. Leave, however, was given the defendants to move that this verdict might be set aside and a nonsuit entered, if the Court should be of opinion that the action was not maintainable.

Mr. Serjt. *Vaughan*, on a former day in this Term, accordingly obtained a rule *nisi* to that effect, on the objections taken at the trial.

Mr. Serjt. *Pell* now shewed cause. The only question is, whether this action can be maintained under the statute 29 *Eliz*. *c*. 4. The process was a writ of *levari facias*, issued out of the Exchequer for a debt due to the Crown, which is in the nature of an extent, or at all events an execution, and therefore falls within that statute, by the particular words of which, the sheriff is equally entitled to poundage on a *levari facias* for a crown debt, as on any other writs of extent or execution. That statute was passed to prevent extortion by sheriffs and their officers in cases of execution (*a*). Before the statute 3 *Geo*. 1. was passed, the sheriff was entitled to poundage on an extent or process issuing out of the Court of Exchequer, by usage, and there is nothing in that statute which will prevent the plaintiffs from

(*a*) By which it was enacted, that it should not be lawful for any sheriff or his officers, by reason or colour of their office, to receive or take of any person whatsoever, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person, more than twelve pence for every twenty

maintaining the present action. In *Deacon* v. *Morris*(*a*), which was an action founded on the 29 *Eliz.* for extortion, against a sheriff for having taken more than he was entitled to under a writ of *levari facias* for a crown debt, no objections similar to those raised in the present case, were taken in the argument, or suggested by the Court; and if they were tenable, it must be supposed that they would have been there made. Here, the plaintiffs' right to sue, not only arises on the statute of *Elizabeth*, but in point of principle continues, notwithstanding that of 3 *Geo.* 1. In *Jones's Index to the Exchequer Records*(*b*), it appears, that by an order of *Michaelmas* Term, 3 *Will. & Mary*, it was directed, as by a former order of *Easter* Term, 2 *Car.* 1, and several subsequent orders, that all sheriffs shall be allowed poundage of one shilling *per* pound, for all monies levied on the summons of the pipe and green wax (except post fines); and one shilling and sixpence *per* pound for all monies levied on process of *fieri facias*, out of either of the remembrancer's offices; and that farmers of all green wax, (except post fines) should make the like allowances to the sheriffs. Although the 13th section of 3 *Geo.* 1.(*c*) states, that a sheriff

shillings, where the sum does not exceed one hundred pounds, and sixpence for every twenty shillings above that sum that they should so levy or extend, and deliver in execution, or take the body in execution for, by virtue of any such extent or execution whatsoever, upon pain and penalty that every such sheriff, &c. which at any time shall, directly or indirectly, do the contrary, shall forfeit to the party grieved his treble damages.

(*a*) 2 Barn. & Ald. 393. (*b*) Vol. ii. Addenda, tit. Sheriffs.

(*c*) By which it is enacted, that no sheriff, or his officers, or other person employed in levying or collecting any debts, duties, or sums of money, due or to become due to his majesty, by process of the Court of Exchequer, shall take, ask, or receive any fee or reward whatsoever of the person liable to pay the said debts, &c. or of any other person, upon pretence of such levying or collecting, except the sum of four pence only for an acquittance for such sum as shall be so levied or collected; which acquittance such officer was required to give and deliver to the person upon whom such debt should be levied, collected or received; and the bailiff or other person receiving such debt should, from time to time, account to the sheriff or his deputy, and might require an acquittance also from them for such sum, who were required to give

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employed in levying debts due to the Crown shall take only four pence for an acquittance, and that if he takes any money for levying an execution, he is thereby guilty of extortion, still that section does not supersede the remedy given by the statute of *Elizabeth*, as it has merely given an additional remedy, by a summary application to the Court of Exchequer, and consequently is merely accumulative, and does not destroy the effect of the former statute. Although the best might have been done by the officer for the sale of the goods, still the delay was made by the direction of the bankrupt, after he had committed an act of bankruptcy, and he could exercise no discretion whatever as to the disposition of his property. At all events, this action is rightly brought by his assignees, for if the bankrupt has sustained an injury, it results to them; and it has been decided in the case of *Brandon* v. *Pate* (*a*), that if a trader, before his bankruptcy, lose money by gaming, his assignees may recover it in an action against the winner; so here, though the words of the statute of *Elizabeth* give the penalty to the party grieved, yet in a case similar to the present, the assignees are entitled to the same remedies as the bankrupt himself had.

the same without any fee or reward; and that in case any sheriff or other person should presume to demand or receive any sum whatsoever, of any person whatsoever, from whom any debt or sum of money was or should be due and payable to the Crown, by process out of the Court of Exchequer, for or in respect or upon pretence of executing the said process, or for or in respect of fees due to them for collecting or receiving the same, contrary to the intent and meaning of that act; or if any of such officers or persons should demand and receive any sum whatsoever, for not levying, or forbearing to levy any debts, &c. which were or should be due to his majesty, and written out to him by the process aforesaid; in every such case, every person so offending, and being thereof lawfully convicted, should be adjudged to be guilty of extortion, injustice and oppression; and every such person, being thereof lawfully convicted, should forfeit, for every such offence, treble damages and costs to the party aggrieved, and double the sum so extorted; all which damages and penalties should be ordered, decreed and given by the Barons of the Court of Exchequer, upon complaint and proof of such extortion made and exhibited before them, in such short and summary way as to them should seem meet; provided such conviction were had and made within two years after such offence committed, and not otherwise.

(*a*) 2 Hen. Blac. 308.

Mr. Serjt. *Vaughan*, in support of the rule, was stopped by the Court.

Lord Chief Justice DALLAS.—It is not necessary for us to decide whether the facts as proved at the trial, amount to an extortion on the part of the defendants or not. Generally speaking, extortion is the taking more than an officer of the sheriff is entitled to receive by virtue of his office; or in other words, is the taking more than ought to be charged by him for the performance or execution of his duty. Here, however, it formed no part of the officer's duty to allow time for dividing the bankrupt's property into lots or proportions for the convenience and advantage of sale, and it was done at the request of the bankrupt himself; besides which, it appeared, that the officer bestowed his time and labour in dividing such property, in order that it might be disposed of to greater advantage, and be more productive to the bankrupt's estate. Under these circumstances, I do not think that a charge made for keeping a man in possession until the sale, amounted to an extortion: but if I entertained any doubt as to that point, the result would be, to send the cause to be retried. I shall therefore abstain from expressing any opinion as to whether the facts which were given in evidence amount to an extortion or not; for the ground on which I rely is, that the statute of *Elizabeth*, on which this action is founded, applies only to cases as between party and party. Before the passing of the statute 3 *Geo.* 1. it appears that orders were issued from the Court of Exchequer, regulating the sums officers were entitled to, or sheriffs allowed to claim for poundage, under process issued out of that Court. Those orders therefore clearly shew, that a sheriff was not entitled to poundage under the statute of *Elizabeth*, for if he had been, no such orders would have been necessary. Then came the statute 3 *Geo.* 1., which applies to all process issuing out of the Court of Exchequer to recover debts due to the Crown; and for the first time gave a sheriff a

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particular sum for poundage, to which it does not appear he was before entitled, *viz.*—on a writ of *levari* one shilling *per* pound for every hundred, and six pence for every pound beyond that sum; and by the 13th section of that statute it was enacted, that no sheriff or other person, employed in levying debts due to the Crown, should take any fee for levying, except four pence only for an acquittance; and that if he demanded more, he was thereby guilty of extortion, and incurred a penalty of treble damages to the party grieved, to be ordered and given by the Court of Exchequer, in a summary way, on an application to that Court. As therefore, the process in question was issued for the purpose of recovering penalties due to the Crown, I am of opinion that the plaintiff's remedy ought to have been on the latter statute, and consequently that this action cannot be maintained.

Mr. Justice PARK.—I am entirely of the same opinion, and beg to confine myself to the ground as stated by my Lord Chief Justice. I have therefore not fully considered whether the facts as proved, amount to an extortion, but I am at present inclined to think they do not. It is however, unnecessary for me to consider that point, as it is quite clear that previously to 3 *Geo.* 1. *c.* 15, no sum for poundage, *quasi* poundage, could be claimed by a sheriff on executing process for a debt due to the Crown. The statute of *Elizabeth* applies only to executions between party and party; and it appears, that from the passing of that statute until that of 3 *Geo.* 1. where a sheriff levied for a crown debt on any extent or process issuing out of the Court of Exchequer, he was in the habit of applying to that Court for relief, and that they accordingly issued orders for poundage on such levy. It is quite clear that this would have been unnecessary, if the sheriff could previously have claimed poundage as a matter of right, under the statute of *Elizabeth*. The words there are, that he shall not take more than a certain sum for serving an extent or execution. It appears

to me, that the term "extent," in that statute, means a writ of extent sued out on a recognizance, or statute staple, or a common law writ of extent issued by a subject, and not on the prerogative writ of the crown. For executing process of the latter description, the orders for sheriffs to receive poundage were granted as a matter of favor. The 3d section of the statute 3 *Geo.* 1. enumerates and distinguishes the different descriptions of writs:—Besides the allowance to a sheriff for poundage is to be taken out of the debt due to the Crown for which the process is issued, and not out of the effects of the subject; and by the 13th section of that act, a remedy is given to the party grieved, by an application to the Court of Exchequer, the Barons of which were authorised to decree and give a penalty, in such short and summary way as they should think proper; whilst, under the statute of *Elizabeth*, the party aggrieved may sue for the penalty, amounting to 40*l.* by action of debt, and recover one moiety thereof, together with treble damages. By the 3 *Geo.* 1. however, the damages and penalties are to be in the discretion of the Court of Exchequer, and to be obtained by a compulsory process issued out of that Court. After that statute was passed, the orders of that Court became no longer necessary; for the Barons have now a summary jurisdiction. It appears by the report of the case of *Deacon* v. *Morris*, that the only question before the Court was, whether the plaintiff was entitled to treble costs as well as treble damages, under the statute of *Elizabeth*, and no mention is there made whether the execution was levied for a debt due to the Crown or not.

Mr. Justice BURROUGH.—I decline giving any express opinion whether this action could be maintained or not, even if it fell within the statute of *Elizabeth*, but as to the subject-matter, it may be fairly implied from the adduced facts, as proved at the trial, that they did not amount to an extortion on the part of the sheriff or his officer. The assignees stand

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in the situation of the bankrupt, and claim through him, to whom an indulgence was granted at his particular request; and as a person was employed to keep possession of his premises, and rendered assistance until the goods were sold, I think that the remuneration claimed for his time and trouble would not amount to an extortion. It is unnecessary, however, to say more on this part of the case, as I fully agree with my Lord Chief Justice and my Brother *Park*, as to the construction put by them on the statute 3 *Geo.* 1. on which the sheriff's right to poundage under a *levari facias* for a debt due to the Crown, was first given; previously to which, he was not entitled, as a matter of right, to any fee for so doing; and by that act the Court of Exchequer have full jurisdiction as to the application of damages and penalties, and the party aggrieved must pursue the remedy pointed out by that statute.

Mr. Justice RICHARDSON.—The only point on which I think it necessary to express an opinion is, that the present action has been misconceived, in being founded on the statute of *Elizabeth*, because that statute does not apply to process issuing out of the Court of Exchequer for crown debts, but only to cases as between subject and subject. Previously to the passing the statute 3 *Geo.* 1. a sheriff was only entitled to receive such fees as the Court of Exchequer might think meet to allow him, by orders issued by them for that purpose. In *Peacock* v. *Harris* (*a*), it was resolved, that the statute 29 *Eliz. c.* 4. does not extend to real executions, but only to executions in personal actions; nor to executions upon statutes-merchant, recognizances, &c.; for the act is to be understood of cases where the judgment *redditur in invitum*, and not by the voluntary confession of the party.

Rule absolute for a nonsuit (*b*).

(*a*) 1 Salk. 331.——(*b*) See *The King* v. *Villers*, 8 Price, 587.

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ORR *v.* MORICE and two Others.

Monday, Nov. 26.

THIS was an action of *assumpsit* for use and occupation. The defendants pleaded the general issue.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last Term, it appeared, that the defendants were the assignees of a bankrupt, but the plaintiff did not declare against them as such, but in their own right; and the only question was, whether they had occupied certain premises held by the bankrupt under the plaintiff to the time of the bankruptcy, so as to render them liable in this action. It was proved that two of them kept the key of a counting-house belonging to the bankrupt for a year and a half after the bankruptcy, and never tendered it to the plaintiff. The plaintiff gave the defendants notice to produce the deed of assignment of the commissioners to them, and on its being produced by the defendants' attorney for the purpose of shewing that they were assignees, an objection was made as to its being given in evidence, without first proving the execution of it by the subscribing witness who was in Court, but not called by the plaintiff's counsel so to do. His Lordship over-ruled the objection, and admitted the deed in evidence, without proof of such execution, as he thought that as it came from the defendants' custody under the notice to produce it, it was sufficient, and more particularly so as they had taken a beneficial interest under it. The Jury accordingly found a verdict for the plaintiff, damages 42*l.* 10*s.* being the sum claimed by him, but leave was given the defendants to move to set it aside, in case the Court should be of opinion that the execution of the deed should have been proved by the subscribing witness, previously to its being given in evidence at the trial.

In an action for the use and occupation of premises against the assignees of a bankrupt:—Held, that the deed of assignment of the bankrupt's effects produced by the defendants at the trial, under a notice from the plaintiff so to do, was admissible in evidence, without proof of the execution by the subscribing witness, as it appeared that two of the assignees had continued to occupy the premises after the act of bankruptcy, and thereby claimed a beneficial interest under the deed.

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Mr. Serjt. *Hullock* on a former day in this Term accordingly obtained a rule *nisi*, that this verdict might be set aside and a nonsuit entered, and cited the cases of *Pearce* v. *Hooper* (*a*), *The King* v. *The Inhabitants of Middlezoy* (*b*), and *Gordon* v. *Secretan* (*c*).

Mr. Serjt. *Pell* now shewed cause, and submitted that the plaintiff had made out a clear case at the trial, so as to render the defendants personally responsible, and that as they were not described in the record as assignees, they were liable independently of the deed of assignment: still, however, as the defendants produced that instrument under a notice from the plaintiff, it was unnecessary for him to prove its execution by the attesting witness; for in *Pearce* v. *Hooper*, which is the latest and leading case on this subject, it was decided that although the mere possession of an instrument does not dispense with the necessity which lies on the party calling for it, of producing the attesting witness, yet, where a person is called on to produce a deed to which he is a party, and under which he claims to hold an estate, and he produces it, it shall be taken to be a good deed, so far as relates to the execution as against himself; and Lord Chief Justice *Mansfield* there said (*d*), "The defendant had no interest in the fee simple of the estate, if the deed did not convey it; consequently, if he produced the deed under which he claimed, should it not be taken to be a good deed, so far as relates to the execution as against himself?" Here, two of the defendants not only acted under the deed of assignment, but claimed a beneficial estate by occupying the counting house in question for so long a period after the bankruptcy, and as it appeared to be in their custody, it must *primâ facie* be taken to have been duly executed, and was therefore properly received in evidence at the trial.

(*a*) 3 Taunt. 60.——(*b*) 2 Term Rep. 41.——(*c*) 8 East, 548.——(*d*) 3 Taunt. 65.

Mr. Serjt. *Hullock*, in support of the rule. Although the defendants were not declared against as assignees, still, in order to render them liable in this action, they must have taken possession of the premises either by express undertaking or actual occupation. In *Naish* v. *Tatlock* (*a*), where a tenant from year to year of a house at a yearly rent, became bankrupt in the middle of the year, and his assignees entered and remained till the expiration of the year; it was determined that the lessor could not maintain an action for use and occupation against the assignees, for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy, during the time that elapsed before his bankruptcy. Here, however, the defendants must be considered as strangers, and only two of them were affected by the evidence given at the trial. The case of *Pearce* v. *Hooper* is distinguishable from the present, as there the party claimed a beneficial interest in the estate under the deed, whilst here it does not appear that the defendants took any interest for their own benefit, on the contrary, they disclaimed it by their plea. There, too, the deed produced by the plaintiff was the only proof he could have in support of his action, as it formed the principal part of his title; and the only questions were, whether the place in which the trespass was alleged to have been committed belonged to him as parcel of a certain estate; and whether it had been conveyed to him by the deed in question or not: he should therefore have produced it without being called on by the defendants so to do.

Here it appears that the attesting witness was in Court, and he therefore ought to have been called to prove the execution of the deed of assignment. Although, in *The King* v. *The Inhabitants of Middlezoy*, it was decided, that a deed coming from the opposite party after notice to produce it, must *primâ facie* be taken to be duly executed, and received in evidence without proof of the execution; yet Lord *Ellenborough*, in the subsequent case of *Gordon* v,

(*a*) 2 Hen. Blac. 319.

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Secretan, said (*a*), that "The case of *The King* v. *Middlezoy* had been much questioned at the time, and since overruled, and that the production of an instrument at the trial, in pursuance of a notice, would not supersede the necessity of proving it by one of the subscribing witnesses, if any, as in ordinary cases." In *Johnson* v. *Lewellin* (*b*), Lord *Ellenborough* held, that where ship's articles come from the adverse party upon notice, the subscribing witness must be called, except in the single case of an action by a seaman for wages, for which occasion such articles were made evidence of themselves by the statutes 2 *Geo.* 2. *c.* 26 & *c.* 36. So in *Wetherston* v. *Edgington* (*c*), Mr. Justice *Heath* held, that where an agreement not under seal, is produced at the trial by one of the parties, in pursuance of an undertaking to produce it, the opposite party, in order to make it evidence, must prove it in the same manner as if it had come from his own custody. The reason stated by Mr. Justice *Buller* in *The King* v. *Middlezoy* (*d*), that a deed, when produced, must *primâ facie* be taken to be duly executed, was, that the plaintiff not knowing who were the subscribing witnesses, could not come prepared at the trial to prove its execution; but that difficulty may be now completely obviated, by obtaining a rule of Court, or a Judge's order to inspect the instrument before the trial (*e*).

Lord Chief Justice DALLAS.—The cases decided on this subject appear to be contradictory. The general rule laid down in that of *The King* v. *Middlezoy*, on first consideration, I should have thought to be correct, *viz.* that a deed coming from the opposite party after notice to produce it, must *primâ facie* be taken to have been duly executed, and must be received in evidence without proof of the execution by the subscribing witness. That rule however, seems to

(*a*) 8 East, 549.——(*b*) 6 Esp. 101.——(*c*) 2 Camp. 94.——(*d*) 2 Term Rep. 43.——(*e*) See *Cooke* v. *Stocks*, *M.* 36 *Geo.* 3. K. B. 1 Tidd, 7th edit. 501. 2 Camp. 95, n.

have been founded on the difficulty that the party calling for the production of the deed could not know who the subscribing witnesses were, until the instrument was produced. That doctrine was expressly over-ruled by Lord *Ellenborough* and Mr. Justice *Lawrence*, in the case of *Gordon* v. *Secretan*, by which it was established, that the party who calls for the production of a deed in pursuance of a notice, could not supersede the necessity of proving its execution by one of the subscribing witnesses, as in ordinary cases. Then came the case of *Pearce* v. *Hooper*, in which that rule appears to have been restricted; and the result of all these decisions appears to be, that where a party to a suit, in pursuance of a notice, produces an instrument to which he is a party, and under which he claims a beneficial estate, it will not be necessary that the other party who is a stranger to the instrument, should call the attesting witness to prove the execution;—but that in other cases where the adverse party produces a deed under which he claims no beneficial interest, the execution ought to be regularly proved by the party who offers the instrument as part of his evidence in the cause. Here, therefore, the only question is, whether the defendants as assignees, claimed a beneficial interest in the premises, for the occupation of which the action was brought, under the deed of assignment which they were called on by the plaintiff to produce. They appeared to have been occupied by the bankrupt to the time of his bankruptcy, and the defendants as his assignees, entered and continued the occupation of his counting-house for a year and a half after such bankruptcy, without offering to give up possession or the key to the plaintiff. They therefore claimed a beneficial interest under the bankruptcy, which appears to me to bring this case within the rule established in that of *Pearce* v. *Hooper*, and I am therefore of opinion, that it was not necessary to prove the execution of the deed by the subscribing witness, as the defendants had occupied the premises under it.

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Mr. Justice PARK.—Whether the general rule as laid down in *The King* v. *Middlezoy*, was proper or not, is unnecessary for me to consider; but after it was dissented from by Lord *Ellenborough* in *Gordon* v. *Secretan*, where his Lordship appears to have laid down a general and unqualified rule, from which it may be inferred that if a party to a suit, in consequence of a notice, produces an instrument executed between himself and others, yet that the other party, though a perfect stranger to the instrument, ought to prove the execution, if he means to avail himself of it in evidence, has been productive of many practical inconveniences, and I have frequently seen plaintiffs nonsuited in consequence of it. Whether it be requisite to consider the generality of that rule in future, is not necessary for the Court to enquire into in the present instance: for here the only question is, whether under the circumstances, the defendants took a beneficial interest under the deed in question? I am clearly of opinion that they did, and therefore, that the present case falls within that of *Pearce* v. *Hooper*, where the general rule appears to have been most properly restricted, *viz.* that where the party produces a deed under which he claims a beneficial estate, it is not necessary for the party requiring its production to call the attesting witness to prove its execution.

Mr. Justice BURROUGH.—I remember the case of *Passel* v. *Godsall* (*a*), where the plaintiff had given the defendant notice to produce an agreement at the trial, and on the defendant's producing it, his counsel objected to its being read in evidence until the plaintiff proved its execution; but Lord *Mansfield* over-ruled the objection, saying, that the defendant produced it as the original agreement, and that therefore the plaintiff was not bound to prove its execution. The same point was determined in *The King* v. *Middlezoy*, and I think those decisions have furnished the soundest rule to

(*a*) 2 Term Rep. 44, n.

govern cases of this description; for under that so generally laid down in *Gordon* v. *Secretan*, it must frequently defeat the party who calls for the production of the deed, if it be necessary for him in all cases to prove its due execution. Here, however, the defendants occupied the premises for the enjoyment of which this action was brought, as assignees of the bankrupt. By their continuing in possession, they took a beneficial interest, which was clearly proved on the face of the deed under which they took the property of the bankrupt as such assignees, and he continued in possession of the premises himself until the act of bankruptcy committed by him; after which the defendants entered, and continued to occupy for a year and a half, without offering to give up the possession to the plaintiff.

Mr. Justice RICHARDSON.—It cannot be understood that in every case where a party is called on under a notice to produce a deed or other instrument, that on its production he must be deemed to admit that it was duly executed. That was admitted in *Pearce* v. *Hooper*, where Lord Chief Justice *Mansfield* observed (*a*), that "Supposing that an heir at law is in possession of a will, and the devisee brings an ejectment, and calls on the heir to produce the will; there the heir claims, not under the will, but against the will, and it would be very hard that the will should be taken to be proved against him, because he produces it: but that is very different from the case where a man is called upon to produce a deed under which he holds an estate." So, if a deed be fraudulently made, it is not sufficient to prove the mere possession of it by the party, to render it conclusive against him on his producing it, without proving its due execution. But from the case of *Pearce* v. *Hooper* it seems to be established, that where an instrument is valid, and the party who produces it claims a beneficial interest under it, it is not necessary for the party calling for it to prove such execution, because, by

(*a*) 3 Taunt. 65.

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taking such interest, the person in whose custody it is, must be deemed to have admitted its due execution at the time it was made. This case does not appear to me to be so strong as that of *Pearce* v. *Hooper*; still, however, I think the deed was admissible in evidence under the circumstance, without calling the attesting witness. There the plaintiff brought an action of trespass, and his title to the estate depended on the deed of conveyance under which he claimed. This was an action for use and occupation of premises which the defendants enjoyed and claimed as the assignees of a bankrupt. It appears that two of them acted in transacting the affairs of the latter, and kept possession of a counting house which had been rented and held by him until the time of his bankruptcy. The plaintiff therefore gave them notice to produce at the trial the deed under which the property of the bankrupt was assigned to them, and by which it appeared that they had been duly appointed his assignees. They therefore were liable for the occupation of the premises, as they claimed an interest therein for the purpose of conducting the affairs of the bankrupt. I therefore concur with the Court in thinking that this case falls within the principle laid down in *Pearce* v. *Hooper*, and that this rule must consequently be

Discharged.

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GOSS *v.* WATLINGTON.

Tuesday, Nov. 27.

In debt on bond against the surety of a deceased collector of taxes, conditioned for the due performance of his duty as such, and for delivering to the obligee all books and accounts entrusted to his care; a collecting book received by him from his predecessor, for the faithful delivery of which to the obligee, the defendant became surety; and on the death of the principal, it was accordingly delivered to such obligee, containing the names of the parishioners residing within the parish for which the collector was appointed, and the sums at which they were rated, and the usual mark was made by him therein, opposite to some of such names, by which he indicated the receipt of the sums assessed on them;—and receipts signed by him for money paid to him in his official capacity, were produced and received in evidence against the surety, on the execution of a writ of inquiry:—Held by the Court, on a motion whether they ought to have been admitted, that the entries made in such book were properly received as evidence at the trial, as it might be deemed a public book; but that the circumstances of the case did not warrant either an actual or implied authority by the surety, so as to admit the receipts of the principal as evidence against him.

THIS was an action of debt on bond. The declaration stated, that the defendant on the 13th *May*, 1813, by his certain writing obligatory, acknowledged himself to be held and firmly bound to the plaintiff in the sum of 100*l*., which writing obligatory was subject to a certain condition, whereby, after reciting that one *Thomas Watts* had lately been chosen and elected the beadle of the ward of *Queenhithe*, in the city of *London*; and that in order to secure the payment of all taxes, rates, and other assessments which he might, by virtue of such office, be at any time appointed to collect and receive, unto the plaintiff, the deputy of the said ward, he the said *Thomas Watts* and the defendant had agreed to enter into the above-written obligation, the condition of which was declared to be, that if *Watts* should well and faithfully collect and receive the watch-rate, and the several taxes and assessments which he then was or should thereafter be employed to collect or receive by the plaintiff as such deputy, and also should well and truly pay, or cause to be paid the same watch-rate, taxes, &c. and every part thereof respectively unto the plaintiff, his executors or administrators, or their order, upon demand, from time to time, when and as soon, and as often as the same, or any part thereof respectively should be received by *Watts*, deducting only the customary allowance for the collection thereof; and also should at all times so long and as often as *Watts* should continue or be employed as collector or re-

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ceiver as aforesaid, diligently employ himself in and about the collecting and receiving the watch-rate, and all other taxes, &c.; and also if *Watts*, his executors or administrators, should at all times when required by the plaintiff, his executors or administrators, render unto him or them a full and perfect account in writing, of such his employment, collection and receipt, and deliver up to him or them all the books and accounts entrusted to his care as collector or receiver, or as beadle, and should in all respects well and faithfully demean and conduct himself in the execution of his duty and employment; then the bond should be void and of no effect; otherwise to remain in full force and virtue. The plaintiff then averred, that although *Watts*, after the making of the bond and condition, to wit, on, &c. and on divers other days and times between that day and the commencement of this suit, by virtue of his office as beadle, did collect and receive the watch-rate, and several other taxes, &c. which he was employed to collect and receive by the plaintiff as such deputy as aforesaid, to the amount of 100*l.*, after deducting the customary allowance for the collection thereof; and that although *Watts* afterwards, to wit, on, &c. was demanded and required by the plaintiff to pay to him the said sum of 100*l.* so collected and received by him, according to the condition of the bond, yet that he had altogether refused, and still refuses to pay over the same or any part thereof to the plaintiff:—By means whereof the bond became forfeited, and an action had accrued to the plaintiff to have from the defendant the sum of 100*l.* above demanded. The defendant suffered judgment by default.

On a writ of inquiry under the statute 8 & 9 *Will.* 3. *c.* 11. *s.* 8, to assess damages for the breaches of the condition of the bond, which came on to be executed before Lord Chief Justice *Dallas* at *Guildhall*, at the Sittings after the last Term, the death of *Watts* was proved, and in order to shew that the rates were received by him in the ordinary manner, and that he continued to collect them till the time of his death,

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as well as to prove the amount of the sums received by him in his character of beadle or collector, the book which he had received from his predecessor in that office, and which, on the death of *Watts*, was given up to the plaintiff as deputy of the ward, was produced and offered in evidence, which book contained the names of the several inhabitants of the ward who were chargeable with the rates, the amount of each person's assessment being opposite to his name, and four columns for the rates of each quarter of the year. It also appeared from the book, that the manner in which *Watts* was in the habit of denoting his receipt of the rates from any particular person, was to make a cross in the column applying to the quarter for which the rates were received. The daughter of *Watts* proved that this was the mode adopted by him to indicate that he had received the rates, and that the crosses in the book were made by him, and that she had been in the habit of assisting her father in the execution of his business as beadle, and making up his accounts. Several receipts signed by *Watts* for monies paid to him in that capacity, were also produced in evidence; and it was also proved, that on making up the accounts of *Watts* from the collecting book, after allowing him credit for all his payments and his salary, there was a balance due from him to the ward of 109*l*. For the defendant it was objected, that neither the collecting book, nor the entries made therein by *Watts*, nor the receipts given by him for monies received as such collector, were admissible against the defendant as surety, after the death of *Watts*, but that it was necessary to call the parties who had paid him the sums which were crossed out in the book, and to whom he had given the receipts on the payment of such assessments. The Jury assessed the damages for the plaintiff at 100*l*. being the penalty of the bond; but leave was given the defendant to move to reduce them in case the Court should be of opinion that the book and receipts ought not to have been admitted in evidence against him, or

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that it was necessary for the plaintiff to have given further evidence, or called the parties who had made the several payments to *Watts*.

Mr. Serjt. *Pell* on a former day in this Term, accordingly obtained a rule, calling on the plaintiff to shew cause why the damages found by the Jury on taking the inquisition, should not be reduced to a nominal sum. He submitted, that the entries in the collecting book, and the receipts offered in evidence, constituted no legal proof as against the defendant as surety, as they merely tended to shew that *Watts*, as the principal, had received those sums; and that although they might have been good evidence as against him, still that they could not be considered as such against a third person as surety, who could only be liable for the default of his principal. Besides, they were not the best evidence, as the persons who had paid the monies to *Watts*, might have been themselves called to prove such payments. A receipt for money is not conclusive evidence against the person who may have signed it, as it is only presumptive evidence of payment; and he may shew that the money has not been received (*a*). At all events, a receipt of an agent is no proof of payment to such agent on account of his principal, and as this is a case between principal and surety, the best evidence ought to have been produced, *viz.* the persons who paid the sums in question to *Watts*.

Mr. Serjt. *Vaughan* and Mr. Serjt. *Peake* now shewed cause. The only question is, whether the entries made by *Watts* as beadle in his collecting book kept by him for that purpose, as well as the receipts signed by him for monies paid to him in his official capacity as such, were admissible in evidence against the defendant as surety, after the death of his principal. Although these entries and receipts were made and given against the interest of the latter, still they

(*a*) *Straton* v. *Rastall*, 2 Term Rep. 366.

would have been admissible in an action against him, or would be sufficient to charge his representatives. He was a co-obligor with the defendant; they must therefore be considered as privies in interest; and it is a well known and established rule, that where several have entered into a contract, the declarations of one will bind the others. The entries and receipts in question were admissible in evidence against the defendant, not only on principle, but by several decided cases. It was the duty of *Watts* to authenticate the payments made to him; and it was part of the condition of the bond, that he should deliver to the plaintiff (the obligee) all books entrusted to his care as collector or beadle; and on his death it appears that they were delivered up to him accordingly. The admissions of one co-obligor may be used as evidence to affect another. So in an action against several persons who have a joint interest, a declaration made by one concerning a material fact within his knowledge, is evidence not only against him, but all who are parties with him to a suit. Here, too, *Watts* was dead at the time of the trial. It is quite clear, that had he been alive he might have been called as a witness to give evidence of the sums he had received, although it might be against his own interest; and the entries made and receipts given by him, were consequently admissible at the trial. The distinction was drawn by Lord *Ellenborough* in *Harrison* v. *Blades* (*a*) as to the death of a party, where he observed, "I cannot dispense with the attendance of a witness who is still alive and within the jurisdiction of the Court, so as to admit evidence of his hand-writing, in the same manner as if he were actually dead." In *Higham* v. *Ridgway* (*b*), the principle was established, that if a person has peculiar means of knowing a fact, and makes a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his

(*a*) 3 Camp. 458. S. C. Phillips on Evidence, vol. i. 5th edit. 260.
(*b*) 10 East, 109.

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death, if he could have been examined to it in his life-time. So in *Warren*, d. *Webb* v. *Greenville* (*a*), it was held, that an entry in an attorney's debt-book acknowledging the payment of money due to him for professional charges, was admissible in evidence after his death. The case of *Perchard* v. *Tindall* (*b*) is infinitely stronger than the present, where it was held, that an admission by the principal was evidence against the surety, and that the principal need not be called. That was an action of debt on bond against the surety of a sheriff's officer, for his not paying over the levy money; and there was an indorsement on the writ by the officer to the following effect:—"Discharge the defendant out of custody, I have received the levy money;" and it was held by Lord *Kenyon* to be sufficient evidence to charge the officer with the receipt of the money, without calling him to prove that fact, although he was alive. In *Kempland* v. *Macauley* (*c*), which was an action against a sheriff for a false return, it was decided by Lord *Kenyon*, that evidence that the original defendant acknowledged the debt, was admissible in such action against the sheriff; and although in *Cutler* v. *Newlin* (*d*), it appears, that on the execution of an inquiry under the 8 & 9 *Will.* 3. *c.* 11, on an indemnity bond, an admission by the principal of the amount of the damnification was considered inadmissible, and the amount was proved *aliunde*, still it does not appear whether the party who made that admission, was living or not. In *Whitcomb* v. *Whiting* (*e*), it was decided, that an acknowledgment by one of several drawers of a joint and several promissory note, will take it out of the statute of limitations as against the others, and may be given in evidence in a separate action against any of the others; and Lord *Mansfield* there said (*f*), that "payment by one is payment for all, the one acting virtually, as agent for the rest; and in the same manner, an admission by one, is an admission by all." [Mr. Justice

(*a*) 2 Stra. 1129. —— (*b*) 1 Esp. 394. —— (*c*) Peake's Ni. Pri. Cas. 3d edit. 95. —— (*d*) Manning's Ind. 2d edit. 137. tit. Evidence, (H. c.) (*e*) 2 Doug. 652. —— (*f*) Id. 653.

Park.—In *Brandram* v. *Wharton* (*a*), Lord *Ellenborough* observed, that "the doctrine of rebutting the statute of limitations by an acknowledgment other than that of the party himself, began with the case of *Whitcomb* v. *Whiting*; and that although he was bound by that decision, where there was an express acknowledgment by the actual payment of a part of the debt by one of the parties liable, still that that case was full of hardship;" and his Lordship then stated what inconvenience might follow from it.] The same principle was adopted in *Brockman's case* (*b*), and *Vicary's case* (*c*), the latter of which was an action of covenant against two defendants, and it was held, that the affidavit of one of them might be given in evidence against both. So in *Grant* v. *Jackson* (*d*), where in an action by a creditor against some of the partnership firm, the answer of another partner to a bill filed by other creditors, was received in evidence against the defendants, not for the purpose of proving the partnership, but that being established, as an admission against those who were as one person with him in interest. And in *Wood* v. *Braddick* (*e*), it was determined, that an admission by a partner, although not a party to the suit, is evidence as to joint contracts against any other partner, as well after the dissolution of the partnership, as during its continuance. On the same principle, in an appeal against the removal or settlement of a pauper, declarations by a rated inhabitant of either parish, concerning the facts in issue, have been held to be admissible in evidence against the other rated inhabitants of his parish. *The King* v. *Hardwick Inhabitants* (*f*). *The King* v. *Whitley Lower Inhabitants* (*g*). In *Barry* v, *Bebbington* (*h*), the rule was established, that the declarations of deceased persons were admissible as evidence in cases where they appear to have been made against their interest, as entries in

(*a*) 1 Barn. & Ald. 467.— (*b*) Gilbert on Evidence, vol. 1. page 51. (*c*) Id. 59.———(*d*) Peake's Ni. Pri. Cas. 3rd edit. 268.—(*e*) 1 Taunt. 104.———(*f*) 11 East, 578.———(*g*) 1 Maul. & Selw. 636.——— (*h*) 4 Term Rep. 514.

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their books, charging themselves with the receipt of money on account of a third person; and in *Doe*, d. *Reece* v. *Robson* (*a*), where entries were made in a deceased attorney's book, charging for engrossing and registering a lease on a particular day, which was after its date, were received as evidence to shew the exact day of its execution. In *Evans* v. *Lake* (*b*), where upon an issue out of Chancery, to try whether eight parcels of stock bought in the name of the defendant, were in trust for one *Evans*, and his assignees (the plaintiffs) shewed, first, that there was no entry in the defendants books relating to this transaction; secondly, that six of the receipts were in the possession of *Evans*, and there was a reference on the backs of them by his book-keeper to a certain shop book of *Evans*; and thirdly, that the book-keeper was dead, and upon this the question was, whether the book so referred to, in which was an entry of the payment of the money, should be read; the Court of King's Bench, at a trial at bar, admitted it not only as to the six parcels, but likewise as to the other two which were in the hands of the defendant's son. In *Brett* v. *Levett* (*c*), an acknowledgment by the drawer to the holder, that a bill of exchange would be returned to him, was held to dispense with the proof of notice of dishonor, although such acknowledgment was made after an act of bankruptcy was committed. In *Price* v. *The Earl of Torrington* (*d*), where the plaintiff being a brewer, brought an action against the defendant for beer sold and delivered; and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that his draymen came every night to the clerk of the brewhouse, and gave him an account of the beer delivered out, which he set down in a book, to which the draymen set their hands, and that one of the draymen was dead, and that the signature was in his hand-writing; it was held to be good evidence of a delivery, as it was set down in the ordinary course of business.

(*a*) 15 East, 32.——(*b*) Bull. Ni. Pri. 7th edit. by Bridgman, 283.——(*c*) 13 East, 213.——(*d*) 1 Salk. 285.

So here, the entries by *Watts* were made at the time he received the rates, and the receipts were signed by him for monies paid him in his capacity of beadle. He was bound to make those entries by the condition of the bond, and there was no evidence of the receipt of monies by him but by those entries and the receipts given, and as they would have been evidence as against himself or his representatives, so they were equally admissible against the defendant as his surety; and where a declaration made by a party accompanies the act done, it is not necessary to prove such act *aliunde*.

Mr. Serjt. *Pell*, in support of the rule.—The entries and receipts in question were clearly not receivable in evidence on principle. It is therefore unnecessary to controvert any of the decisions which have been relied on in support of their admissibility, as they are inapplicable to the present case. The main proposition is, that the declarations of a co-obligor who is dead, are not evidence as against his co-obligor who is alive; and no distinction can in point of fact be drawn as to a co-obligor's making declarations, whether he be alive or dead. No case can be found, where entries made by a person who is dead, were held to be admissible, unless such person could have been called to prove the same facts, when living; for if the rule were not so limited, it would open a door to fraud and collusion. If any authority be wanting, the case of *Cutler* v. *Newlin* appears to be precisely in point, where it was held, that an admission by a principal on the execution of an enquiry on an indemnity bond, was not evidence against the surety. [Lord Chief Justice *Dallas*.—It does not appear in that case, whether there was a public account of entries made from time to time by the principal in the course of his duty, or not; and is there no distinction between a public or private account?] The rules of evidence in this respect are equally applicable to both. The only distinction is, that copies of records are only receivable when they are deposited in their proper places, and access can be had to them. Those rules are not only the land marks of

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property, but the safeguard of life itself, both of which might be endangered if the entries in question were admissible as against third persons; or in other words, that such entries made by a deceased principal, should have the effect of binding his surety. It is quite clear, they were not the best evidence, for they were not on oath; and in every instance where evidence not on oath is received, it is a case of exception to the general rule. So the plaintiff might have proved the payments of the sums received by *Watts* by the parishioners who had paid such monies to him, on their producing his receipts to establish such payments. Although in *Biggs* v. *Lawrence* (*a*), it was held, that where an agent is employed to buy goods, his acknowledgment of having received them was evidence of a delivery to the buyer, yet there is no case where an entry by a third person has been held to be evidence to charge another with monies received by the former; nor where a receipt given by the principal, has been admitted in evidence against his surety, unless such surety had authority to represent his principal when the party who paid the money could have been called at the trial. [Mr. Justice *Richardson*.—Surely *Watts*, if he had been alive, might have been called to prove the fact of having received the monies.] Although he might have been, it does not follow that admissions made by one co-obligor can be used as against the other, and more particularly so as between a principal and surety, for they are not jointly interested, as the surety can only be liable for the default of his principal. It is therefore not like the case of partners or privies in interest, who have a joint interest in the result of an action (*b*). In *Harrison* v. *Blades*, the hand-writing of the tax-gatherer to receipts signed by him, could not be received in evidence, as he was incapable of attending at the trial, through illness; and Lord *Ellenborough* there observed, that (*c*) "where a witness is taken ill, the party who would avail himself of his testimony must move to put off the trial." The point in

(*a*) 3 Term Rep. 454.——(*b*) See Phillips on Evidence, vol. i. page 93
(*c*) 3 Campb. 458.

question did not arise in that case. No distinction can be drawn between a collector of taxes and a private individual; and in *Perchard* v. *Tindall*, it was said, that the officer himself ought to be called; but it was over-ruled by Lord *Kenyon*, as the officer was in fact the defendant in the action. The plaintiff however, afterwards proved the actual receipt of the money by the officer by another witness. So here, the persons who paid the money to *Watts*, should have been called to prove that he received it from them. In *Rex* v. *Hardwicke*, and *Rex* v. *Whitley Lower*, the declarations of a rated inhabitant were held admissible; but there the parties were alive, and were directly and immediately interested in the event of the proceeding. So in *Brett* v. *Levett*, the acknowledgment was made by the party in his lifetime, but after he had committed an act of bankruptcy; but that case was decided on a different ground, *viz.* as to whether there was a sufficient petitioning creditor's debt. In *Higham* v. *Ridgway*, the entry was received to shew the time of the birth of a child. That, however, was merely to prove a collateral, and not a direct fact; and it appeared distinctly from other evidence, that the work charged for was actually done. So in *Warren*, d. *Webb* v. *Greenville*, the proof of the suffering the recovery was collateral to the point in issue. In *Evans* v. *Lake*, the entries were not offered by the assignees as evidence against the seller, of the payment for the goods, but as corroborating evidence to shew that while the books of the other parties concerned took no notice whatever of the goods, those of *Evans*, under whom the plaintiffs claimed, treated them as bought on his account; and the case of *Price* v. *The Earl of Torrington* turned entirely on the course of trade, and the witness who proved the entries made by the drayman, saw him sign the book every night. Here, however, the only question is, whether the declarations of a principal can be received in evidence against his surety; and it is immaterial whether such principal be alive or dead; or whether the surety was bound for the acts of his principal in a public

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or official situation, or in a private capacity only. [Lord Chief Justice *Dallas* observed, that he recollected a case in the Exchequer, where the defendant became surety for an army agent, in which Mr. *Scarlett* took the same objection as was now raised, *viz.* that the declarations of the principal could not be received in evidence against the surety. This is not like the case of partners or privies in interest, but as between principal and surety, and claims as against a surety must be taken *strictissimi juris*, as he is always favored in law. A surety may be liable in many instances, as on a bond given to bankers or brewers for the faithful discharge of the employment of their clerks. Would not entries made in books by such clerks be evidence of the receipt of money, without calling the persons who paid it to them? Another class of sureties is in cases as between principal and agent; and another where persons guarantee to pay the debt of another; and in *Bacon* v. *Chesney* (*a*), it was held, that where goods were sold to *A.* on the guarantie of *B.*, *A.*'s subsequent declarations respecting the terms of the sale, were not evidence against *B.*, since *A.* was not the general agent for him.]

The Court required the collecting book to be handed over to them, in order to see the nature of the entries, and the mode adopted by *Watts* as to marking the sums received by him; which being accordingly done, they took time to consider until this day, when his Lordship delivered the judgment of the Court as follows:—

This case has taken an extensive range of argument at the bar, and several authorities, as well as other matters, have been referred to, which do not appear to be connected with the subject, or at all events have no very close application to it. The ground on which the Court will decide, lies in a very narrow compass. Some points are so extremely clear, that they require no exposition; and it is a principle most fully established, that whatever a man says,

(*a*) 1 Stark. Ni. Pri. Cas. 192.

even in criminal cases, is evidence against himself, although it may be against his own interest, and open to explanation. In a variety of instances however, as well as on the reason of the thing, it is not evidence against others. Here the entries in the collecting book of *Watts* are in the nature of declarations of the party, but the action is not brought against him, but against the defendant as his surety. The questions then are, first, whether those entries by the principal, in which he charged himself with the receipt of different sums of money, could be used in evidence against his surety; and secondly, whether the receipts signed by the principal, and given to persons for monies paid by them to him in the execution of his office, be or be not evidence to charge his surety? It is necessary in the first place to advert to the situation of the parties. The defendant was a surety. His principal was dead at the time of the commencement of the action, and had filled the situation of collector of the watch-rates and other taxes and assessments in the parish in which he lived. The bond by which the defendant became his surety, and on which he was sued, was conditioned for the faithful discharge of *Watts* in collecting the rates, taxes, &c. and paying them to the plaintiff (the obligee) from time to time as he received them, and that he should keep a full, true and perfect account in writing of his employment, collection and receipts, which he was to give to the plaintiff whenever he might be required to do so, as well as to deliver up to him all the books and accounts entrusted to his care as collector or receiver. It is quite clear therefore, that the obligation imposed on the defendant as surety was for the due delivery of the rates, duties, and assessments, and of the books of his principal, to the plaintiff. The book in question, in which the entries were made, must be considered as a public book, as it was stated in the condition of the bond, that all books entrusted to the care of *Watts*, were to be delivered to the plaintiff from time to time, or whenever he might be required to do so. The defendant by

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recognizing this book, rendered it admissible in evidence against him; therefore the entries made by *Watts* therein, and the marks by him in ticking off those sums which were received by him in his capacity from the persons assessed, are evidence as against his surety, as they must be considered as entries made in a public book.—As to whether the receipts signed by *Watts* are evidence against the defendant as his surety, is a matter of some doubt. It has been said, that in no case can the receipt of a principal be evidence against his surety, or that on the other hand the receipt of an agent can bind his principal; but there might be either an express authority which would justify such receipts to be admitted in evidence, or such an authority might be implied from circumstances dependant on the nature of each particular case. In *Biggs* v. *Lawrence*, which was an action for goods sold and delivered, a written paper, by which the defendant's agent acknowledged the receipt of the goods, was admitted as evidence against the principal; but in the subsequent case of *Bauerman* v. *Radenius* (*a*), it was stated by counsel in argument, that Lord *Kenyon*, since the decision in that case, had frequently ruled the contrary, without its ever having been questioned. It does not appear from *Biggs* v. *Lawrence*, whether the agent's acknowledgment of having received the goods, was made at the time of delivery, or on what other occasion. In many cases doubts may arise, whether an agent be empowered to bind his principal, or not, or whether a principal be authorised to appoint such agent; but I cannot accede to the proposition, that in no case is the receipt of the agent admissible in evidence to bind his principal. Independently of this, however, the Court are of opinion, that on the facts of the present case, enough does not appear to make the receipts in question sufficient evidence against the defendant as surety of *Watts*; but as they appear to be consistent with the entries made by the latter in his book, by which he indicated that he had

(*a*) 7 Term Rep. 665.

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received the sums assessed from the persons whose names were ticked off, and as such book was admissible in evidence, and the defendant is bound by the entries made therein, it is sufficient for us to say that the plaintiff is entitled to recover against the defendant to the extent of the entries made in that book.

A verdict was therefore ordered to be entered for the plaintiff, for such sums as might be due from *Watts*, as should appear by the book; the amount of which was referred to the associate, who was to consider the entries made therein as evidence against the defendant as surety:—and on these terms the rule was made

Absolute.

FORSHAW *v.* CHABERT.

Tuesday, Nov. 27.

On a policy of assurance on ship and goods "at and from *Cuba* to *Liverpool*, with liberty in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, and with leave to discharge and take in at any ports or places she might call at, without prejudice to that insurance;" the assured, after the subscription of the policy, inserted in the body of it, the words "with leave to call off *Jamaica*," which was acquiesced in by all the underwriters except the defendant, without increase of premium:—Held, that this was a material alteration, and avoided the policy as against the defendant.

Where a ship sailed on her outward voyage from *Liverpool* to *Cuba*, with a crew of thirteen men, and on her arrival at the latter place three had died and two deserted there, and the captain could only procure eight men for the whole of the homeward voyage, and two for *Montego Bay*, in *Jamaica*, (ten men being a competent crew to navigate the vessel), and he accordingly touched at *Montego Bay*, for the sole purpose of landing those two men and procuring others in their stead, which he did, and the vessel was lost by the perils of the sea, in proceeding from thence on the voyage to *Liverpool*:—Held, that on a policy from *Cuba* to *Liverpool*, the ship was not sea-worthy as to her crew for the whole of her homeward voyage when she sailed from *Cuba*; or that even if she then had a sufficient crew, the touching at *Montego Bay* was a deviation, and that the circumstance of her having become sea-worthy by having a sufficient crew at the time of the loss, did not entitle the assured to recover as against an underwriter on the policy.

THIS was an action of *assumpsit*, brought against the defendant as underwriter on a policy of assurance, dated the 2d *March*, 1820, on the ship "*Hope*," and goods lost or not lost, at and from her port or ports of loading in *Cuba*,

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to *Liverpool*, with liberty for her in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, and with leave to discharge and take in at any ports or places she might call at without prejudice to that insurance. The declaration contained two counts on the policy, the first of which stated the voyage to be at and from the ship's port or ports of loading in *Cuba* to *Liverpool*, "*with leave to call off Jamaica*," and averred a loss by perils of the sea; and the second count stated the voyage to be from her port or ports of loading in *Cuba* to *Liverpool*, omitting the words "with leave to call off *Jamaica*," and averred a like loss by perils of the sea. The defendant pleaded the general issue (*a*).

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last Term, it appeared, that the words "with leave to call off *Jamaica*" were inserted in the body of the policy, after it had been subscribed by the defendant and the other underwriters, and had been introduced without his knowledge or assent, he being ill and absent from *London* at the time. It was also proved, that all the other underwriters (nine in number) on application being made to them, raised no difficulty as to the introduction of those words, but sanctioned their insertion by signing their initials opposite to them in the margin of the policy, without requiring any additional premium. It was also given in evidence, that the ship originally sailed on her outward voyage, with a crew consisting of thirteen men; that before the captain arrived at *Cuba*, three had died, and two others deserted him there; that he could not procure any men at *Cuba* to prosecute the whole of the homeward voyage to *Liverpool*; but that he could only engage two to assist in the navigation of the vessel to *Montego Bay*, in *Jamaica*, and whom he stipulated to leave there; that he

(*a*) The declaration contained two other counts on another policy, underwritten by the defendant on the same ship, on the 20th *June*, 1820, on which the Jury found a verdict for him, on the ground of concealment.

accordingly set sail from *Cuba* with eight men only for *Liverpool*, and proceeded to and touched at *Montego Bay*, for the sole purpose of landing those two men whom he had hired at *Cuba*, and procuring others, so as to constitute a sufficient crew to complete the voyage to *Liverpool*, and that he remained at *Montego Bay* no longer than was necessary for that purpose, and sailed from thence two days after he touched there, with a crew consisting of thirteen men, having taken five on board there, and that the ship whilst in the prosecution of her voyage to *Liverpool*, was wrecked on the shoals of *St. Phillip's Quays*, and abandoned by the captain and crew, who left her in the long boat whilst she was on the point of sinking, and were afterwards picked up by a *French* brig, and landed at the *Havannah*. It further appeared, that ten men were a sufficient crew to navigate the vessel from *Cuba* to *Liverpool*, but that the captain having only eight at *Cuba* who would continue the whole of the homeward voyage, he went to *Montego Bay*, in order, as he said, to avoid any censure by the owners; and that he had no fraudulent purpose in touching there.

Contradictory evidence was given as to whether the risk was increased by the ship's going to *Montego Bay* or not; when it was objected for the defendant, that at all events the alteration in the policy was material, and rendered it void as against him, as it tended to increase the risk, and would consequently have required an additional premium as the touching at *Jamaica* was a deviation, *Montego Bay* not being in the course of the voyage from *Cuba* to *Liverpool*; and that the ship having sailed from *Cuba* with a crew of eight men only for *England*, she was not sea-worthy when she broke ground there on her homeward voyage.

His Lordship left it to the Jury to say, whether the risk was increased or not by the ship's going to *Montego Bay*; that if it was materially increased, the assured had no right to introduce the words "with leave to call off *Jamaica*" in the policy; that if there was a justifiable reason for the

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captain's putting in there, the consent of the defendant was not required to the alteration, nor was such alteration itself necessary, because, the putting into *Montego Bay* might have been done without leave of the underwriters; and he also left it to them to determine whether the alteration under the circumstances was material or not.—They found that the captain was warranted in putting into *Montego Bay*, and that he had done so for the benefit of all parties, and consequently found a verdict for the plaintiff.

Mr. Serjt. *Taddy* on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside, and a general verdict entered for the defendant instead thereof, or that a new trial might be granted, on the ground of a mis-direction by his Lordship to the Jury, in his having stated to them, that if the captain had been justified in putting the ship into *Montego Bay*, the consent of the defendant was not necessary to the alteration in the policy; or that at all events the effect of the alteration was a question of law, and ought not to have been left to their determination.

The learned Serjeant submitted, that as the policy in question was not effected on the voyage out and home, but from *Cuba* to *Liverpool*, it could not attach as to the voyage insured, until the vessel was in every respect rendered competent for the performance of such voyage. If she was not sufficiently manned when she sailed from *Cuba*, she left it in an un-seaworthy state, and deviated to a port, in order to render herself competent to the completion of the voyage to *Liverpool*, which was not the voyage insured by the defendant; and under the circumstances the captain was not necessitated to proceed to *Montego Bay* at all, and if he had been, the defendant would be discharged, as the vessel was not sea-worthy at the time she left *Cuba*. In *Forbes* v. *Wilson* (*a*), Lord *Kenyon* held, that under the words "*at and from*" it is sufficient if the ship be sea-worthy at the time

(*a*) Park on Insurance, 6th edit. 299, n.

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of sailing; for from the nature of the thing, the ship, while at the place, must probably be undergoing some repair. The same doctrine was laid down by Lord *Mansfield*, in *Eden* v. *Parkinson* (*a*); and in *Watson* v. *Clark* (*b*), the policy was held to be void, as the vessel was not seaworthy when she sailed on the commencement of the voyage insured. Here, therefore, she ought to have been completely manned for the whole of the voyage when she broke ground at *Cuba*. The case of *Sanderson* v. *Symons* (*c*), goes to the full extent as to the allowance of an alteration of a policy, but is inapplicable to the present, as there the ship had liberty to trade, without the introduction of the words "and trade" in that instrument.

Mr. Serjt. *Hullock* now shewed cause. It appears that the captain, under the circumstances, was fully justified in proceeding to *Montego Bay*, and that his doing so was for the benefit of all concerned, and that fact has been found by the Jury. The only question then is, whether the vessel was seaworthy at the time she left *Cuba*? She had then ten men on board, which was a sufficient crew; and as the captain was prevented from procuring a full compliment there, to prosecute the whole of the voyage to *England*, he was fully warranted to use every endeavour to obtain a competent crew for that purpose; and he therefore most properly engaged two, one of whom it appeared was an *Englishman*, and the other a *Spaniard*, to forward the vessel to *Montego Bay*, where others might be found to proceed on the remainder of the voyage. It would have been highly imprudent for him to have left *Cuba* with eight men only for *Liverpool*, and as he sailed with ten, it was a matter of supervening necessity which compelled him to put into *Montego Bay*, and consequently, his going there was not a deviation, as it was justified by prudential necessity; and it was found at the

(*a*) 2 Doug. 735.——(*b*) 1 Dow. 356.——(*c*) Ante, vol. iv. 42. See also *Sanderson* v. *M'Cullom*, Id. 5.

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trial, that he staid there no longer than was necessary for the completion of his crew. The alteration in the policy therefore was immaterial, and does not avoid it as against the defendant.

With respect to seaworthiness, the case of *Weir* v. *Aberdeen* (*a*), is expressly in point, where a ship insured at and from a port, sailed on her voyage in an un-seaworthy state, in consequence of having a larger cargo than she could safely carry; and the defect was discovered before any loss accrued, and part of the cargo was discharged, and a loss subsequently accrued, in no degree attributable to her having been overladen in the early part of her voyage:—it was held, that the underwriters were liable for such loss. So here, even if the crew were incompetent at *Cuba*, still, as the loss was attributable to the perils of the sea, and after the captain had obtained a sufficient crew to navigate her to *England*, the defendant must be deemed liable, and more particularly so, as the loss in question was in no degree attributable to the condition in which she originally sailed, and from which she had been freed at *Montego Bay*, by the captain's procuring a sufficient crew there for the purpose of completing the homeward voyage. There were never less than ten men on board, which was proved at the trial to be sufficient to navigate the vessel from *Cuba* to this country; she was therefore seaworthy from *Cuba* to *Montego Bay*, where she touched from necessity, and if the two men taken on board at *Cuba* would have continued the remainder of the voyage, the crew would have been competent from beginning to end. If the captain had been unable to freight the ship at *Cuba*, and had proceeded to another port for supplies, it would not have avoided the policy.—As to the alteration, it must depend upon facts; and as the Jury have found it to be immaterial, as the captain did all he could for the best, their verdict cannot be disturbed. In every case where an alteration has been held to vitiate the policy, it has been made in a most

(*a*) 2 Barn. & Ald. 320.

material point, as in *Langhorn* v. *Cologan* (*a*), where the subject-matter of the insurance was added after the execution of the policy. So, in *Fairlie* v. *Christie* (*b*), the time of sailing was enlarged, by which the risk was materially increased. Here, however, it appears that the ship's touching at *Montego Bay* did not increase the risk, as all the underwriters, with the exception of the defendant, assented to the alteration, without requiring any additional premium.

In *Sanderson* v. *Symons*, where the words "*and trade*" were inserted in the policy after it was executed, it was held to be an immaterial alteration, as the ship had liberty to trade, without the introduction of those words; and Mr. Justice *Park* there said (*c*) that "it was most properly considered by the Jury, whether the introduction of those words made any difference, and they found by their verdict that they did not." So here, the Jury found that the captain was warranted in putting into *Montego Bay*, and the defendant would consequently have been liable, even if there had been no alteration in the policy. Taking it therefore, that the ship was in point of fact never unseaworthy, but had a sufficient crew during the whole of the voyage, and that the captain acted for the benefit of all concerned; and the Jury having found the alteration in the policy to be immaterial, the plaintiff is entitled to retain his verdict.

Mr. Serjt. *Taddy*, in support of the rule. This case does not expressly embrace a question of deviation, or the effect of the alteration in the policy, but turns chiefly on the point whether the vessel was seaworthy or not at the time she left *Cuba*. It must be admitted, that if part of a crew die or become sick in the middle of a voyage, a captain may touch at different ports for the purpose of supplying their places, but the question is, whether, under the circumstances, he was

(*a*) 4 Taunt. 330.——(*b*) Ante, vol. i. 114. S. C. 7 Taunt. 416.——(*c*) Ante, vol. iv. 47.

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warranted in acting as he did when he left *Cuba*? Although the ship might have been then seaworthy for the purpose of proceeding to *Montego Bay*, still she was not so, for the performance of the whole of the voyage to *Liverpool*, as there were only eight men then on board to proceed to the latter port, which was clearly an incompetent crew. A ship, in order to be seaworthy, must be fit in every respect at the moment of breaking ground, or commencement of the voyage; but here, she was not in a proper condition to perform the whole of the voyage at the time of its inception, for the captain took the chance of procuring an addition to his crew at *Montego Bay*. He might not have found any men there who would proceed with him to *England*, any more than at *Cuba*, and if that were the case, he might have proceeded to any other port he might have thought proper. It was a condition precedent on his part to have completely manned his vessel at *Cuba*, before she sailed. In *Watson* v. *Clark* (*a*), Lord *Eldon* "held it to be a clear and established principle, that if a ship was seaworthy at the commencement of the voyage, though she became otherwise only one hour after, still the warranty was complied with, and the underwriter was liable. But that when the inability of a ship to perform the voyage became evident in a short time from the commencement of the risk, the presumption was, that it was from causes existing before her setting sail on her intended voyage, and that the ship was then *not seaworthy*; and the *onus probandi* in such a case rested with the assured, to shew that the inability arose from causes subsequent to the commencement of the voyage." That distinction was warranted by the case of *Monro* v. *Vandam* (*b*), where it was held, that if a ship sail upon a voyage, and in a day or two become leaky, and founder, or is obliged to return to port without any storm, or visible or adequate cause to produce such an effect, the presumption is, that she was not seaworthy when she sailed. The case of *Weir* v. *Aberdeen* is distinguishable from the present, as

(*a*) 1 Dow. 344.——(*b*) Park on Ins. 6th edit. 289, n.

there the underwriters recognized the ship's being overloaded, by a memorandum indorsed by them upon the policy; and it is impossible to ascertain what quantity of goods a ship may carry with safety; but whether she had a sufficient crew or not at the time of sailing, may be not only known, but proved with an absolute certainty. Although, therefore, the captain may have acted for the best, the defendant is discharged from his policy, as it was the duty of the former to have obtained a complete and sufficient crew at *Cuba*; and as he omitted to do so, but proceeded to *Montego Bay* for that purpose, it was a deviation, as it was out of the direct course of the voyage from *Cuba* to *Liverpool*. At all events, the alteration in the policy has avoided it as against the defendant, for it was made in the body of that instrument, and not by any memorandum in the margin or on the back, and is material, as it tended to increase the risk. The case of *Sanderson* v. *Symons*, therefore, does not press on the defendant, as there the alteration was deemed immaterial, as the assured had a right to trade, before the introduction of the words "and trade" in the policy. Here, however, the voyage was not only altered, but prolonged, by touching at *Montego Bay*, and was different from that insured against by the underwriters; and even if the risk were not increased, it was at all events a deviation in point of legal effect. With respect to the cases of *Langhorn* v. *Cologan*, and *Fairlie* v. *Christie*, they are expressly in point, and have never been impeached; and although it may be said that this is in the nature of a several contract with each of the underwriters, and may be considered as a general voyage from *Cuba* to *Liverpool*, still the defendant is not liable on the policy, as he had not acquiesced in the alteration which was introduced without his knowledge in the body of the instrument.

Lord Chief Justice DALLAS.—This is an objection to which I am reluctantly disposed to yield, because it is against

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the justice of the case. All the other underwriters, on being applied to, consented to the alteration of the policy without requiring any additional premium. Unfortunately for the assured, the defendant was ill and absent from town, or he would otherwise have been applied to; and although, in all probability, he would have added his initials if he had been present, as all the other underwriters had consented to do, yet, as he has not done so, the objection is now urged, and he contends, that he is not bound by the policy. The case however, must be decided on legal grounds; and it is therefore necessary to consider in the first place, whether the ship was seaworthy or not at the time of her sailing from *Cuba*. The voyage insured was not a voyage from *Liverpool* to *Cuba* and back again, or in other words, a voyage out and home, but the policy was to attach on her departure from *Cuba* to *Liverpool*. The voyage, therefore, was to be direct from one place to the other, but the following words were afterwards inserted in the policy, *viz.* "with leave to call off *Jamaica*." This shews that the party who caused them to be added, thought that it was necessary to do so, in order to give liberty to the vessel to call or touch off *Jamaica*, as she was not entitled to do so under the terms of the policy as it originally stood. It is quite clear that a ship must be seaworthy at the time of her sailing. The assured warrant that she is so, and whatever necessities may interpose, they cannot deviate from the terms of their warranty. Here it must be taken from the circumstances of the case, that what was done by the captain was not only without fraud or collusion, but for the benefit of all concerned; and the only question is, whether he was justified in acting as he did or not? He went to *Montego Bay* for the sole purpose of leaving some, and procuring or taking in more men in their stead. If he had a sufficient crew at *Cuba* for the whole of the voyage, his touching at *Montego Bay* would have been an increase of risk, and he would have no right to go there circuitously for any purpose whatever, and his touching

there would be a deviation, as he would not have been necessitated to do so. Taking it the other way, he had not a sufficient crew at *Cuba* for the voyage insured, for although he had ten men, which might have been a competent and sufficient crew, still two of them were engaged to proceed no further than *Montego Bay*, and eight only were on board to prosecute the whole of the voyage. The ship, therefore, was not seaworthy at the inception of the voyage, as it was the duty of the captain, at all events, to have had a sufficient crew to proceed from *Cuba* to *Liverpool*, and not to *Montego Bay*. In either way it appears to me that the case is with the defendant, for the ship was not seaworthy at the time of her sailing;—or there has been a deviation. The Jury found that the captain put into *Montego Bay* for a justifiable cause. If there had been no alteration in the policy, but a necessity had existed for his touching there in the course of the voyage, it would not have been a deviation, although it might not have been in the direct course of the specific voyage insured against; for if the crew had been wholly insufficient to navigate the vessel, it would have been an act of necessity for the captain to have provided himself with one; but I rely mainly on the circumstance, that the vessel had not a sufficient crew at the time she sailed from *Cuba*, and consequently, that there was no inception of the insurance in question, as she was not seaworthy at that time. The only mode by which the defendant could be liable, he having subscribed the policy without the words "with leave to call off *Jamaica*," would have been by a loss happening in the direct course from *Cuba* to *Liverpool*; and one of the counts in the declaration is founded on the contract as it originally stood. The question then is, whether the defendant can be deemed liable, although the vessel touched at *Montego Bay*? That will depend on whether the captain was justified in going there or not. If the alteration be immaterial, the defendant would be liable on the policy as

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it originally stood. It was proved at the trial, that the alteration was a material part of the risk, and one of the witnesses who had been long acquainted with the navigation in voyages of this description, said, that the risk was thereby increased. The alteration, therefore, must be considered as material, as it was introduced in the body of the policy, making it, in effect, a different instrument from that which was shewn to the defendant when he subscribed his initials to it. It is not necessary to go into the general doctrine as to the effect of the alteration of deeds, or whether it be made with the assent of the party, or by the act of a stranger; for it is sufficient to observe, that if there be a material alteration in a policy, it will have the effect of avoiding it altogether. The question then is, whether the alteration in question, being embodied in the policy, had the effect of vacating it as against the defendant? It was material at the time it was made, and only became immaterial by subsequent events. The necessity accrued after the alteration was made, and it is only necessary to consider its effect when it was made. If the addition of the words in question to the original contract were proved to have increased the risk, they would have been material, and altogether alter the nature of the policy. I need only advert to the case of *Sanderson* v. *Symons*, where the alteration was held to be immaterial, as it did not alter the legal effect of the contract. There the vessel was insured from *Liverpool* to *Africa*, and during her stay there and back, with liberty to sell, *barter*, exchange, load, and re-load goods; and after the execution of the policy, the assured inserted the words "and trade" in the risk, without the consent of one of the underwriters, although the others had assented thereto, and the Court held, that the alteration was immaterial, and did not vary the terms of the policy, as the ship had liberty to trade without the introduction of those words.

Here, however, the alteration was material at the time it was made, and the events which afterwards happened cannot

have a retrospective operation. As, therefore, the ship was not sea-worthy at the time of her sailing from *Cuba*, and as, under the circumstances, the alteration in the policy was material: it rendered it void as against the defendant, and consequently I am of opinion, that he is entitled to have this rule made absolute.

Mr. Justice PARK.—It is with great reluctance that I agree with my Lord Chief Justice on both points in the decision he has just given, as a more unjust or ungracious objection I never recollect to have been raised in any case. I am extremely happy to find that all the other underwriters have paid without any resistance; but as it is the duty of a Judge to be altogether free from prejudice, the case must be decided on legal grounds. If there be no valid contract, it is not absolutely necessary to go into the question of sea-worthiness. I shall therefore, in the outset, consider the objection which has been raised, as to the alteration of the policy; with respect to which, previous decisions have been pressed on the Court: but it is not necessary to infringe on or impugn the principles there laid down, in deciding this case. In *Langhorn* v. *Cologan* the circumstances differed materially from the present; for the policy was executed in the printed form, without any specific subject of insurance being inserted, and the subject-matter was afterwards added in writing, which was held to be a material alteration; as when once a declaration of interest is made, the policy attaches not on any goods the plaintiff might put on board, but only on those comprehended in that declaration. In *Fairlie* v. *Christie* the policy originally contained a warranty to sail on or before the 10th *October*, which was afterwards altered to the 31st *December*; and the Court held that to be a material alteration, for it altered the nature of the risk, by making a summer a winter risk, and left the underwriters who did not agree to the alteration, without any evidence of a warranty as to the time of sailing, or re-

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striction as to the time when the ship would sail. The case of *Sanderson* v. *Symons* stood on a very different ground; for there the assured had liberty to sell, barter and exchange goods, which was equivalent to a leave to trade, and therefore the insertion of the words "and trade," was deemed to be an immaterial alteration. Here, however, an alteration has been made on the face of the policy, in a material point, by which the risk has been increased, and the integrity of the instrument destroyed. In *Hill* v. *Patetn* (*a*), though the alteration was made on a policy by consent, yet the subject matter of insurance being essentially different, it so far altered the nature of the contract as to render a new stamp necessary; and in *French* v. *Patten* (*b*), which was an action on the same policy, in which the plaintiff sought to recover upon it in its original state, Lord *Ellenborough* said, that "the plaintiff's own act had made, as far as he could make, the policy speak a different language from what he now insists that it does, and he must take the consequences. I cannot therefore say that the policy is not so altered as to have lost its original identity, though the circumstance of a stamp be wanting to give full effect to the instrument so altered: and I do not think that the plaintiff can recur to it again in its original state." And Mr. Justice *Le Blanc* asked, "Can the Court enforce an agreement after the parties themselves have upon the very face of the same instrument declared that it is not their agreement, and have actually written another and a different agreement in the place of it? And I cannot say that it is the same thing as if the memorandum had been written on a different instrument; for it is inserted in the body of the original agreement, and makes it speak a different language. It shews an entire alteration in the minds of the contracting parties." Here, although both parties did not assent to the alteration, yet there was a material alteration by one, without the knowledge or consent of the other. Here, too, the alteration makes the policy speak

(*a*) 8 East, 373.——(*b*) 9 East, 356.

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a different language; for as it originally stood, liberty was given the assured to proceed and sail to, and touch and stay at any ports or places whatsoever, and with leave to discharge and take in at any ports or places she might touch at: but as it now stands, she might call off *Jamaica*, or touch at *Montego Bay* for any purpose whatever, which would be inconsistent with the original contract of the underwriters, who only intended to give the assured liberty to call at any ports for discharging or taking in a cargo, but not to touch for any general purpose. It therefore appears to me to be a material alteration.—With respect to the point as to sea-worthiness, it is unnecessary for me to express any decided opinion; but I think that the vessel cannol be considered to have been seaworthy at the time she sailed from *Cuba*. It has been contended for the plaintiff, that she was not unseaworthy at any part of the voyage, as she was always properly manned; but the real question is, was she so manned for the whole of the voyage, at the time of its commencement at *Cuba*? It is true, that the crew then consisted of ten men, who might have been a sufficient number, and competent to the management of the vessel from thence to *Liverpool*; but only eight of them were engaged for *England*, as two were hired to go no further than *Montego Bay*. If the captain might start with such a crew, he might be entitled to go from port to port to get men, instead of pursuing his voyage directly from *Cuba* to *Liverpool*; but on the ground that the alteration in the policy avoided it as against the defendant, I think he is entitled to have this rule made absolute.

Mr. Justice BURROUGH.—The voyage originally insured by the policy was "at and from the ship's port or ports of loading in *Cuba* to *Liverpool*, with liberty in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, and with leave to discharge and take in at any ports or places she might touch at, without prejudice to that insurance." The "leave to call off *Jamaica*," makes a

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great difference in the legal effect of the policy; for it materially altered the regular course of the voyage, which was intended at the time the policy was executed, to be direct from *Cuba* to *Liverpool*; and the leave and liberty for the vessel to proceed to any ports, and discharge and take in at any places she might touch at, could only apply to that voyage; but when the words "with leave to call off *Jamaica*," were inserted, the ship might discharge there also, which makes a material alteration in the policy. The finding of the Jury as to the fact whether the alteration was material or not, appears to me to have no weight whatever; for the Court must look at the instrument, and see whether it be void or not by the alteration upon the face of it, and they must act upon the effect of that alteration alone. It cannot be contended for a moment but that the introduction of the words in question make a material difference, as they were inserted in the body of the policy, so as to vacate it against the defendant, who has not consented to their introduction; and there is no decision which militates against this construction. In *Sanderson* v. *Symons* the alteration was clearly immaterial, as the leave to the assured to trade must be implied from the former terms of the policy, by which he was allowed to sell, *barter*, and exchange.—As to the term "seaworthiness," it appears to me to be involved in obscurity, and generally speaking, it must be taken to apply to the ship only. In order to render her seaworthy, however, it seems she must have a proper complement of men for the voyage at its commencement. Here it appeared that she sailed on her outward voyage from *Liverpool* with thirteen men; that on her arrival at *Cuba*, three had died, and two deserted there; that the captain felt a difficulty in procuring others; and although he sailed from thence with ten men for *Montego Bay*, yet eight only were engaged for *Liverpool*, and the two he had taken on board at *Cuba* expressly refused to go further than *Montego Bay*. It therefore appears to me, that he should have sailed from *Cuba* to

Liverpool with a proper crew for the whole of the voyage. It seems that eight men would not have been sufficient for that purpose; and as the captain did not provide himself with a full and proper crew at *Cuba*, the vessel was not seaworthy at the commencement of the voyage, so as to render the defendant liable under the policy in question.

Mr. Justice RICHARDSON.—It appears to me that the first point to be considered is, whether there was any valid contract on which the plaintiff could sue at the time the present action was brought; and from antecedent decisions I am bound to be of opinion, that the alteration inserted in the body of the policy has avoided it as against the defendant, as he had not assented or subscribed to such alteration. It is a material fact, that the alteration is made in the body of the instrument, and now stands as though it formed part of the original contract. If such interpolations were allowed to be made, they would tend to fraud, and be productive of imposi-

tions of the most extensive description. The alteration is material in its effect, for it gives the assured leave to call off *Jamaica*, which appears not to be the usual course of a voyage from *Cuba* to *Liverpool*. That such an alteration might lead to fraud, appears to me to be most manifest, as the subscription of an underwriter to a policy is very frequently proved by any person who is acquainted with his hand-writing, and not by the broker by whom the policy is effected. If this be so, and the alteration in question were allowed, the defendant might be charged on the ground of the vessel's going to *Jamaica*, which would be a wholly different contract from that to which he subscribed his name in the first instance. The alteration in this case appears to me to be equally material as those in *Langhorn* v. *Cologan* and *Fairlie* v. *Christie*, and that it may be decided consistently with the principles there laid down. In the former case, the policy was executed in the common printed form, and there were no words in writing descriptive of the specific subject

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defendant was then master of the ship, and refused to allow a licenced pilot to take the command of her. There are two offices in the Custom-house at which ships report and clear out, called the foreign office and the coasting office. The *Levant* cleared out at the foreign office. A clerk from the Custom-house stated, that she would have reported or cleared out in the same manner, had she been loaded with corn. Whether a ship reports or clears out at the foreign office or coasting office, does not depend upon the cargo she carries, but the place from or to which she is bound. The same clerk said, that "all *Irish* vessels were treated as foreign." *Irish* vessels pay a dock duty.

If the Court should be of opinion that this vessel did not, under the above circumstances, fall within the saving clause contained in the second section of the Pilot Act, 52 *Geo.* 3., which excepts from the obligation of taking a Trinity House pilot on board, all *coasting* vessels, and all *Irish* traders using the navigation of the river *Thames* as *coasters*, then the verdict was to stand, but otherwise a nonsuit was to be entered.

The case came on for argument on a former day in this Term, when

Mr. Serjt. *Lens*, for the plaintiff, observed, that the only question was, whether an *Irish* vessel proceeding down the river *Thames*, on her voyage to *Ireland*, fell within the saving clause contained in the second section of the 52 *Geo.* 3. *c.* 39, which, amongst other exceptions, excepts all coasting vessels, and all *Irish* traders using the navigation of the river *Thames* as coasters, so as not to impose on the master or person navigating the same, the obligation of taking a pilot on board, during the time of her sailing down that river; or whether she could be considered as falling within the second section of the 46 *Geo.* 3. *c.* 97, as a vessel exporting corn, &c. from *Great Britain* to *Ireland*, in which case the exporter was to receive a like cocket, &c. as is given and conformable to all the like regulations in force, in case

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of goods sent coastwise, from one port of *Great Britain* to another port therein, or from one port in *Ireland* to another port in *Ireland*. He submitted, that whether the vessel in question were entitled to navigate as a coaster within the meaning of the latter statute, did not depend on the general trading or description of the vessel, but on the nature of the cargo she had on board, which was confined to corn, grain, flour, or bread. So, ships trading generally from *England* to *Ireland*, or from *Ireland* to this country, cannot fall within the denomination of coasters, within the 52 *Geo.* 3. *c.* 39. Vessels can only be considered as such, which trade from one port to another in *Great Britain*, or from one port in *Ireland* to another port in that country, so that those who navigate them may be supposed to have a perfect knowledge of the course they are to take, without a pilot; and as the vessel in question had a general cargo, consisting of ted, &c. on board, she could not fall within the provision of the 46 *Geo.* 3, which applies to the exportation of corn and grain only. Although the term "coasting vessel" is not made use of in that statute, still, it puts a vessel having corn, &c. on board, in the same condition as a regular coaster taking goods coastwise, and must be subject to the same regulations as in the case of goods sent by coasting vessels. The second clause in that statute was intended to facilitate the import and export of grain between *Great Britain* and *Ireland*, in which case only the vessel taking it might be considered as a coaster; but a general cargo to be exported from *England* direct to *Ireland*, cannot be considered as goods sent coastwise; nor could the vessel carrying them be put under the same regulations as a coaster. [Mr. Justice *Park*.—Ships trading coastwise in *Ireland* or in *Great Britain*, are termed coasters; and are not vessels trading from the one country to the other to be so deemed?] This vessel cannot be considered as using the navigation of the river *Thames* as a coasting vessel or coaster; neither can she be deemed as carrying goods coast-

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wise, unless she had a cargo of corn or grain on board, in which case she might have fallen within the provision of the 46 *Geo.* 3. If an *English* trader be going to a foreign port, she cannot be considered as a coaster; for a vessel of the latter description can only carry goods coastwise from port to port in *Great Britain.* So, a vessel which carries goods from port to port in *Ireland* may be deemed an *Irish* coaster; but in order to facilitate the exportation of corn from the one country to the other, vessels are qualified as coasters while carrying a cargo of corn only, but not if they have a general or different cargo on board. The exception in the Pilot Act is expressly limited to all coasting vessels, and all *Irish* traders using the navigation of the river *Thames* as coasters. This latter description of vessels trading from *Great Britain* to *Ireland,* must be limited to those carrying corn; for even if they had been laden with a cargo of that description before the 46 *Geo.* 3, was passed, they could not be considered as, or entitled to the privileges of coasters:—And that statute relates only to goods sent coastwise from one port of *Great Britain* to another port therein, or from one port in *Ireland* to another port in that country, and not from *Great Britain* to *Ireland*; and it is not the description of the ship, but the nature of the cargo on board that constitutes a coaster, within the meaning of that statute.

Mr. Serjt. *Vaughan,* for the defendant. The statute 46 *Geo.* 3. is altogether beside the present question, as it turns entirely on the construction of the second section of the Pilot Act, 52 *Geo.* 3. *c.* 39, which act is expressly entitled, "An act for the more effectual regulation of pilots, and of the pilotage of ships and vessels on the coast of *England,*" and recites that ships and vessels having frequently been wrecked, and many lives and much property lost, from the ignorance or misconduct of persons taking charge of such ships or vessels as pilots, notwithstanding which, many persons not having licence or authority, or competent know-

ledge or experience, have taken upon themselves to act as pilots for conducting ships or vessels to, from, and upon the rivers *Thames* and *Medway*, to the great hazard of such ships or vessels, and their cargoes, and the lives of their crews; it was enacted by the second section, that "from the passing of that act, the corporation of the Trinity House and the Lord Warden of the Cinque Ports should licence fit and competent persons as pilots, to conduct all vessels sailing, navigating, and passing within certain limits of those rivers." The chief object of that statute therefore was, to protect and secure the navigation of these rivers by skilful and competent persons as pilots. The former part of that section applies generally to all vessels sailing and navigating on those rivers, and the only point is, whether the vessel in question falls within the exceptions therein mentioned. In the first place, colliers are excepted, as they are so frequently in the habit of navigating the river *Thames*, that they may be safely entrusted to the care or management of their own crews, without incurring the expence of a pilot. So all vessels trading to *Norway*, and to the *Cattegat* and *Baltic*, and round the *North Cape*, and into the *White Sea*, and all constant traders inwards, from the ports between *Boulogne* inclusive, and the *Baltic*, are excepted, on the ground that they may make a voyage within a year, and must therefore be acquainted with the navigation of those rivers. It is quite clear, that a vessel trading from *England* to *Ireland*, or, in other words, from *Belfast* to *London*, may make six or seven voyages within that period. In a late case it was decided, that a vessel going to *St. Petersburgh* came within the exception of trading to the *Baltic*, on account of the frequency of the navigation. All coasting vessels are likewise excepted, and all *Irish* traders using the navigation of the *Thames* as coasters. It is quite clear, that such traders must in strictness be of the description of coasters, to come within that exception; but if they fall within the denomination of a coasting vessel, it is sufficient, although they may

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not have a cargo of a particular description on board. It has, however, been contended, that such exception can apply only to vessels carrying a cargo of corn, grain, or bread; but the Pilot Act extends to all *Irish* traders generally, and if they use the navigation of the river *Thames* as coasters, they fall expressly within that exception. A coaster may properly be defined to be a vessel trading on the coasts of the United Kingdom. The necessity of their taking a pilot on board cannot be applied to the cargo; if it did, it would have been so expressed by the legislature. The general object of the 46 *Geo.* 3. was to encourage the interchange of corn between *Great Britain* and *Ireland*; but that statute is wholly beside the Pilot Act, which was passed six years afterwards, as the former merely exempted the bounties and duties payable on the exportation and importation of corn and grain, as well as all fees which would otherwise be demanded by the officers of the customs. In another point of view, the term "coaster" may be considered as a vessel being used in the homeward trade, in opposition to a foreign vessel. It appears that if the cargo had consisted partly of goods and partly of corn, the vessel must have been reported and cleared out at both the foreign office and the coasting office; but in the present instance she fell expressly within the denomination of an *Irish* trader using the navigation of the *Thames* as a coaster. If she had left part of her cargo at one port, another at a second, and so on, she would clearly fall within the description of a coaster. Still, however, it has been contended, that she could not be so deemed unless her cargo consisted of corn alone; in which case she would fall under the same regulations as vessels carrying goods coastwise. At all events, the defendant cannot, under the circumstances, be deemed liable to the penalty which is sought to be recovered by the present action; and this being a penal statute, is not to be construed strictly.

Mr. Serjt. *Lens*, in reply. The 52 *Geo.* 3. is a remedial statute, founded on public policy, and passed for the purpose of preserving as well the lives of the crews as the cargoes on board vessels navigating on the river *Thames*. The question in this case is narrowed to a single point, *viz.* whether the vessel in question, trading under the circumstances as detailed in the case, required a regular pilot for the purpose of navigating her down that river. If the 46 *Geo.* 3. can be considered as irrelevant, there is nothing to shew that this vessel was a coaster; for the strict meaning of that word must be confined to vessels going as coasting vessels from one port of *Great Britain* to another port therein, or from one port to another in *Ireland*, and not from *Great Britain* direct to *Ireland*; and a vessel can only be exempted in the latter instance, by exporting a full cargo of corn from one country to the other; and although since the Union, *Great Britain* and *Ireland* are considered as one kingdom, still, the 46 *Geo.* 3. makes a distinction in this particular instance, as it refers to goods sent coastwise from one port of *Great Britain* to another port therein, or from one port in *Ireland* to another port in that country.

Lord Chief Justice DALLAS.—The impression on my mind at the present moment is, that the vessel in question cannot be considered as carrying goods coastwise, or as a coaster, within the meaning of the 46 *Geo.* 3. *c.* 97. *s.* 2., or the 52 *Geo.* 3. *c.* 39. *s.* 2. It appears that she was in the habit of trading from *Belfast*, or some other port in *Ireland*, to *London*, and back again; and in the progress of each of these voyages, she must necessarily be navigating on the river *Thames*. Can she therefore be considered as a coasting vessel or coaster? Several statutes have been passed to regulate the coasting trade in this country. The 31 *Geo.* 3. *c.* 39. recites the 2 *Geo.* 2. *c.* 36, by which certain provisions were established for the government of seamen in ships trading to parts beyond the seas; and also

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reciting, that the coast trade of this kingdom still remained under great difficulties and inconveniences, for want of the like regulations to be applied to and established in the same; for the better government thereof it was enacted, "that from the passing of the 31 *Geo.* 3. (1791), no masters of vessels trading from and to any port or place in *Great Britain*, should carry out to sea any seaman from any port or place in *Great Britain*, to proceed on any voyage to any other port or place in *Great Britain*, without having before entered into an agreement in writing with such seaman for the wages which he was to have during the voyage, or during the time he should have contracted for" (*a*). Can, therefore, a vessel trading generally from *Great Britain* to *Ireland*, be strictly said to carry on the coasting trade? It appears that it was not so considered by the legislature in the 46 *Geo.* 3. *c.* 97; for that statute applies to corn and grain only, in which case the vessel was to be regulated as those carrying goods coastwise, from one port of *Great Britain* to another port therein, or from one port in *Ireland* to another port in *Ireland*. On the construction of that clause, therefore, I think the vessel in question cannot be deemed a coasting vessel. Besides, protection was not to be afforded her by that statute as to the nature of her general employment, but in the conveyance of a cargo of a particular description, which cargo constituted her being subject to the same regulations as a coaster. It further appears in this case, that the vessel had a general cargo on board. It would be attended with great inconvenience if all general traders using the navigation of the *Thames* should be considered as coasters. I have always understood that privileges attached to vessels of that description, extended only to the constant employment of ships in the river *Thames*, or trading on the coast of this country. Pilots have been wisely appointed by the legislature, as being persons fully competent to navigate foreign and other vessels in the river *Thames*; and yet the saving in

(*a*) See also 34 *Geo.* 3. *c.* 68. 42 *Geo.* 3. *c.* 61.

the Pilot Act excepts all *Irish* traders using the navigation of that river as coasters. That exception is certainly vague and doubtful; but still I think it cannot extend to vessels carrying on a general trade from *Great Britain* direct to *Ireland*. What is the true sense or meaning of vessels using the navigation of the *Thames* as coasters? If it can apply to a vessel going from *Great Britain* direct to a port in *Ireland*, how can she be said to be using the navigation of the *Thames* as a coaster? At present I am inclined to think, that a coasting vessel must be confined to a trading from one port of this country to another, or in *Ireland*, from one port to another within that kingdom.

Mr. Justice PARK.—Although I at present concur with my Lord Chief Justice, I wish to consider the true and just construction which may be given to both these statutes, as to what vessels shall be deemed coasters; but, on the other hand, I am of opinion that the argument of my Brother *Lens* is well founded, and that the provision contained in the 46 *Geo.* 3. applies to the cargo only, and not to the vessel conveying it, and therefore that the ship in question cannot be considered as an *Irish* trader using the navigation of the river *Thames* as a coaster, within the 52 *Geo.* 3. *c.* 39.

Mr. Justice BURROUGH.—I must confess I entertain great doubts as to this question. The 46 *Geo.* 3. does not appear to me to be confined to vessels carrying corn only; for a vessel having a cargo of that description on board has as much occasion for a pilot as a vessel having a general cargo. Besides, the 52 *Geo.* 3. expressly excepts all coasting vessels, and all *Irish* traders using the navigation of the river *Thames* as coasters. That appears to me to be sufficient, without their being coasters in the strict sense of the word, and if the statute be not so construed, *Irish* traders must be altogether rejected. Can it be contended that a vessel of this description must drop its cargo at intervals on the banks

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of the *Thames*? At all events, I think the construction to be put on both these statutes, is not so clear or positive as to enable the Court to give the penalty sought to be recovered by the present action.

Mr. Justice RICHARDSON.—I am of opinion, that this vessel does not fall within the provision contained in the second section of the 46 *Geo.* 3. as she had a general cargo on board, and the only question is, whether she can be considered as an *Irish* trader using the navigation of the river *Thames*, as a coaster. I think she cannot; as it appears she had been in the habit of trading regularly from *Ireland* to *London*, and back. Still, however, if she had been laden with corn only, she would have been entitled to the privileges conferred by the 46 *Geo.* 3. *s.* 2. but as she does not fall within that provision, I agree with my Lord Chief Justice and my Brother *Park*, in saying that she cannot be considered as a coasting vessel, or coaster.

On Mr. Justice BURROUGH's expressing his dissent, the Court ordered judgment to be suspended, subject to a future consideration, and on this day

Lord Chief Justice DALLAS said, that the Court were unanimously of opinion that the vessel did not come within the provisions of either of the statutes, and consequently directed

Judgment for the plaintiff (*a*).

(*a*) See *Peake* v. *Carrington*, ante, vol. v. 176. *Usher* v. *Lyon*, 2 Price, 118, by which it was decided, that coasting vessels were not compellable to take pilots on board on entering rivers within the limits of a jurisdiction having authority to appoint and licence pilots; and that the exemption in the 52 *Geo.* 3. *c.* 39, was not confined to coasters using the navigation of the *Thames* alone.

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Tuesday, Nov. 27.

Where ship, freight, and passage-money were insured for 13,000*l.* at and from *London* to the *East Indies* and back, and the ship sailed sea-worthy from *Calcutta*, on her homeward voyage, and afterwards received considerable damage by stormy weather, so as to render it necessary for the captain to put back there, and immediately on his arrival he gave notice of abandonment to the agents for *Lloyd's* resident there, and desired that their surveyor might be present at the surveys of the ship, and the agents replied that they had no authority to accept abandonments; and after three several surveys of the ship by competent persons, at two of which the surveyor for the agents attended, and it was found, that the expence of repairing her would be from 4000*l.* to 5000*l.* and the captain having ineffectually attempted to raise money by hypothecation of the ship, (having no funds to repair her himself) sold her for 1200*l.* and the Jury found, that what had been done by him was for the benefit of all concerned, and gave a verdict for the assured as for a total loss:—Held, that under the circumstances, the sale was justifiable, and the Court refused to grant a new trial.

Where the captain arrived in *London* on the 25th *April*, where his owner resided, and the latter received the ship's papers on the 3d *May* following, and the broker who effected the policy, gave verbal notice of abandonment to the underwriters on the 5th:—Held, that such notice was given in due time.

THIS was an action of *assumpsit* brought to recover a salvage loss of 84*l.* 4*s.* 4*d.* *per cent.* on the defendant's subscription of 200*l.* to a policy of assurance dated on the 15th *August*, 1819, on the ship *Vittoria*, and effected in the name of the plaintiff or as agent, at and from *London* to all or any ports and places wheresoever and whatsoever in the *East Indies* or elsewhere, both on this side, at, and on the other side the *Cape of Good Hope*, necessarily or otherwise, in ports or at sea, in all places, at all times, and on all services, until the ship's arrival back at her final port of discharge in *Great Britain*, with liberty to proceed and sail to, and touch and stay at any ports or places whatsoever, particularly at the *Azores* and *Cape de Verd* Islands, for any purpose whatsoever, without being deemed any deviation, at the premium of 6*l.* *per cent.*; and at the head of the subscription, the insurance was declared to be on ship, valued at 8000*l.* There was also an insurance for 3000*l.* on freight, and a further sum of 2000*l.* on passage-money, on two other policies, amounting in the whole to 13,000*l.* The declaration averred the interest to be in the plaintiff and one *Thomas Bowman*, since deceased; that the vessel set sail from *London* in a sea-worthy state, in the latter part of *September*, 1819, and arrived at *Calcutta* on the 1st *March*, 1820, and sailed from thence on the 15th *July* following, for her port of discharge in *Great Britain*, and that whilst

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she was proceeding on that voyage, she was, by the violence of the wind and tide, driven against a certain brig, by which she sustained damage in her hull and rigging, and that it became necessary to repair her, which was accordingly done at *Calcutta* on the 23d of that month; that being so repaired, she on that day set sail on her voyage; and that from the 2d to the 10th *August*, through hurricanes and stormy and tempestuous weather, she became bilged and strained, and sprung a leak; and that it became necessary for her preservation, and the lives of her crew, to return to *Calcutta*, that she might be again repaired, and that she accordingly proceeded back there for that purpose; that whilst she was proceeding towards *Calcutta*, she sustained a further injury through stormy and tempestuous weather, and that having arrived there, it was found that she had become incapable of performing the voyage, and could not be repaired without a great and imprudent expence; that the master could not procure money sufficient to defray the expence of repairing her, and that it was therefore found to be prudent and necessary for the benefit of all concerned, to sell her, and abandon the voyage; that she was accordingly sold, by means of which, the voyage was not performed, but became wholly lost. There was a second count, stating the loss to be by perils of the sea, to which was added the common money counts. The defendant pleaded the General Issue.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last Term, it appeared that the ship set sail from *London* on her outward voyage, about the end of *September*, 1819, perfectly sea worthy, and marked A. 1. at *Lloyd's*, and arrived at *Calcutta* in the middle of *March*, 1820, where she remained until the month of *July* following, during which period she took on board a cargo for *England*; that she had some caulking, and other trifling repairs done at *Calcutta*, and sailed from thence on her homeward voyage on the 13th of that month; that on the 20th, in pro-

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ceeding down the river *Hoogley*, she sustained an injury in her rigging, by coming in contact with a brig at anchor, but that having been repaired on the same day, she proceeded on her voyage; that on the 28th the pilot left her, and that shortly afterwards she became leaky; that on the 10th *August* she encountered a squall, and made a foot of water *per* hour; that the captain consulted with the carpenter, who thought that the ship was not in a condition to perform her voyage without previously going into dock, and that the former thought it prudent to return to *Calcutta*, and accordingly bore up for that port, the ship being obliged to be pumped every hour, which was done without intermission until the 18th, when a storm arose, which split her sails, and the pump was kept constantly going, and from the continuance of the gale, the whole of the rigging became unserviceable; that on the 22d, the windlass was carried away, and an anchor and part of a chain cable lost, and that on the afternoon of the 29th she arrived at *Calcutta* in the state as before described. On the day of her arrival, the captain entered a protest detailing the above facts, and addressed the following letter to the resident agents for the committee at *Lloyd's*:—

"Understanding you have been appointed agents for *Lloyd's*, where the ship *Vittoria* is insured, I beg leave to announce to you her return to this port in consequence of stress of weather, by which she has been rendered very leaky, and almost all her rigging and sails have been carried away. It appears to me that her damage is considerable, and it is therefore my intention to abandon. I have entered a protest, and shall send you a copy thereof as soon as executed; in the mean time it is my intention to put her into Messrs. *Richardson* and *Co.'s* dock for the purpose of holding a survey on her, at which you will, I presume, send some person to attend. I shall keep you advised of proceedings."—To this letter the agents returned an answer, stating that they regretted to find that the ship was in such a state as to give rise to an intention on the part of the captain to abandon her to the underwriters;

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that they approved of his intention to put her into dock for the purpose of a minute survey being instituted as to her condition, and that if the captain would intimate to them the day when the survey was to take place, they would, if required by him, direct the surveyor to attend in his official capacity. Three surveys were afterwards had, by the first of which, on the 1st *September*, it was found that the ship had been so much strained, generally, by bad weather, that it was necessary for her to be unloaded and docked, previous to a more thorough examination. By the second, which took place on the 4th, it was reported that the windlass was carried away, the main-mast badly sprung, and unfit for further service; that the foremast was injured, and must be taken out for further survey; that the mizen-top-mast was sprung and useless, and that the rigging and sails were irreparable; and by the third survey on the 21st *September*, it was reported, that the bottom of the vessel was so much strained, that it was necessary to strip it entirely; that several repairs were requisite to secure her about her lower deck; and that the expences of stripping and repairing her, would amount to at least 16,000 rupees. The surveyor appointed by the agents for *Lloyd's*, attended at the first and last of these surveys, and on the day the last was completed, the captain wrote to the agents, informing them that the survey had been held, and that it was the opinion of the surveying officers, that the repairs of the hull would amount to 16,000 rupees, the rigging and spars 12,000 more, and expences in port 6000, making together 34,000 rupees; that he thought it would be highly improper to attempt any repair, and that for the benefit of those concerned, she should be sold by public auction, and he again repeated his wish to abandon. To this letter the agents returned an answer on the same day, stating that their instructions from the committee at *Lloyd's* were decidedly against any interference on their part, as in no case were the agents to accept an abandonment of either ship or goods as the representatives of the

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underwriters, but to leave the parties who abandon, to act on their own responsibility. The captain, on the following day, again wrote to the agents, and asked them whether they would, as agents for *Lloyd's*, give orders for the ship's being repaired, to which they returned an immediate answer, stating that they had no authority to direct the captain to repair the ship, and that all the responsibility rested with him. The captain then addressed letters to three of the most respectable houses at *Calcutta*, stating the circumstances of the survey, the supposed expences of repair, and that he had no funds for that purpose without selling part of the cargo, and he requested them to advise him what steps he should take, and they all declined giving him any advice on the subject. On the 23d *September*, the captain wrote to the same houses, to know whether they would advance money on an hypothecation of the ship, which each of them declined; he on the same day made a similar request, by letter, to Messrs. *Richardson* and *Co.*, who declined to do so, unless the captain would hand over to them the freight, bills and policies of assurance. The ship was afterwards advertised, and on the 5th *October* sold at public auction, when her hull and stores produced 11,477 rupees, and after deducting the expences of the sale, the net proceeds amounted to 1,262*l.* 13*s.* 4*d.*

On the captain's being called at the trial, he proved all the above facts, and stated, that he had been twenty-six years at sea; that he attributed the leaking of the vessel, in the first instance, to her having run foul of the brig in the river *Hoogley*; that had he been the owner, he should have followed the same course he had adopted; and that it would have been an act of madness to have repaired her at *Calcutta*, and that he had no money for that purpose. It further appeared, that the captain arrived off the *Lizard* on the 23d *April* last, and came to *London*, where the plaintiff resided, on the 25th; that the ship's papers were received by the latter on the 3d *May*, and the broker went round to the underwriters on the 5th, and made an abandonment of the ship to them by parol, and demanded a total loss, to

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which they then made no objection, but afterwards refused to accept the abandonment. His Lordship was of opinion, that under the circumstances, there had been a reasonable and sufficient notice of abandonment, and was strongly inclined to think that the captain was justified in having acted as he had done, by selling the ship at *Calcutta*, but left that point to the determination of the Jury, and they concurring with his Lordship, found a verdict for the plaintiff as for a total loss.

The *Solicitor-General* on a former day in this Term, had obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, or a nonsuit entered, on the grounds, first, that under the circumstances there had been no abandonment, or that even if there had, notice of it was not given in due time; and secondly, that the captain was not justified in the sale of the ship. In support of the first objection he suggested, that it must be inferred that the owner must have been apprised of all the circumstances attending the loss on the day of the captain's arrival in *London*, and more particularly so, as there had been a previous correspondence between them;—that an abandonment was necessary, as the vessel was not absolutely destroyed; and he relied on the case of *Hodgson* v. *Blackiston* (*a*), where it was held, that a notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received. And in *Martin* v. *Crockatt* (*b*), it was held, that if upon the happening of a peril which suspends the voyage and induces the necessity of repair, the owners choose to make it a total loss, abandonment is necessary. At all events the notice was not given in due time, as the underwriters were not called on for that purpose until ten days after the arrival of the captain in *London*; for in *Hunt* v. *The Royal Exchange Assurance* (*c*), it was held, that a notice of abandonment given by

(*a*) Park on Insurance, 6th edit. 240. n.——(*b*) 14 East, 465.——(*c*) 5 Maul. & Selw. 47.

the assured five days after they received intelligence of the loss, was too late; and in *Mellish* v. *Andrews* (*a*), ten days notice was considered by Lord *Ellenborough* to have been unreasonable, although in that case a new trial was granted on a collateral point. Secondly, as to the sale; the ship, freight, and passage-money were valued by the plaintiff at 13,000*l.* and it appears that she might have been completely repaired for between 3000*l.* and 4000*l.* and it is a general principle, that the captain is only to exercise his discretion for the benefit of all concerned, and as if the vessel were uninsured—and as she produced only 1,262*l.* at the sale, it was against the interest of the owner that she should have been so disposed of, as she was valued by him at 8000*l.* without her freight or passage-money. But although it might be for his interest, as he was thereby enabled to call on the underwriters, still it could not be for the benefit of the underwriters on freight, or all concerned; and from *Reid* v. *Darby* (*b*), it appears that the master has no implied authority to sell a ship abroad, notwithstanding the expences of repairing her might have exceeded her value.

Mr. Serjt. *Lens* and Mr. Serjt. *Pell* now shewed cause.—The only question is, whether this is in the nature of an average or total loss, so that the plaintiff is, at all events, entitled to retain the verdict found for him at the trial, as the Jury decided that the captain was justified in acting as he did at *Calcutta*, and he stated at the trial, that it would have been an act of madness to have repaired the ship. Although it might have been more beneficial to the underwriters on freight for her to have been repaired, let the expences have been what they might, yet the captain had a right to exercise his discretion as to the best steps to be adopted under the circumstances in which she was placed at the time; for in *Idle* v. *The Royal Exchange Assurance* (*c*), it was decided, that in a case where there is an apparent or moral

(*a*) 15 East, 13.——(*b*) 10 East, 143.——(*c*) Ante, vol. iii. 115.

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necessity to sell, and the master acts for the best, he is warranted in selling the ship and cargo; and here it appears, from the whole of the evidence, that he acted *bonâ fide*, and without fraud. So in *Hayman* v. *Molton*, Lord *Ellenborough* said (*a*), that "the sale of a vessel by the captain in a foreign country, could only be justified by extreme necessity, and the most pure good faith," and he most properly left it to the Jury to say, whether, under the circumstances, it was a fair sale, and unmixed with any fraud? Here too, there were three repeated surveys, which were made in the most fair manner possible, as the surveyor for the agents of *Lloyd's* at *Calcutta* attended two of them himself. Besides, the captain would have repaired the vessel if he could have obtained funds for that purpose; but it appears that he could only have got money on handing over the freight, bills and policies of assurance, the latter of which do not appear to have been in his possession. With respect to the abandonment, it was made in the first instance, and at the earliest possible time to the agents of *Lloyd's* at *Calcutta*; it was their duty, at all events, to have immediately communicated it to their principals. They were placed there to prevent impositions, and although they might not be authorised to act as general agents, and accept the abandonment, yet the captain, after having informed them of his intention to abandon, would naturally suppose that they would give the earliest information of the steps he had taken, to the underwriters. In point of fact, therefore, no further abandonment was necessary, as the captain had done all that could be required of him at *Calcutta*, before the sale of the vessel took place. In *Mullett* v. *Shedden* (*b*), where an *American* ship properly licenced was seized, and the cargo condemned, unshipped, and sold by order of a Court of Admiralty abroad, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the captor's costs:—it was

(*a*) 5 Esp. 67.——(*b*) 13 East, 304.

that the assured might recover as for a total loss, without notice of abandonment; the thing insured being wholly lost to the owner by the unshipping and sale of the commodity under the order of the Court abroad. That case therefore, seems to impugn the authority of *Hodgson* v. *Blackiston*, or at all events as being applicable to the present, to supersede the notice of abandonment after the sale and the previous steps taken by the captain at *Calcutta*; for by the sale, the property was wholly lost to the owner, and could never be restored to him. [Mr. Justice *Park*.—In *Mullett* v. *Shedden*, the cargo was sold adversely to the owner, and for the benefit of the captors; whilst in *Hodgson* v. *Blackiston* it was sold by the assent of the parties, and for the interest of the concerned.] [Lord Chief Justice *Dallas*.—In *Allwood* v. *Henckell* (*a*), where the vessel was captured and re-taken, and sold with her cargo under a decree of the Vice-Admiralty Court of *Antigua*, Lord *Kenyon* was inclined to think that an abandonment was necessary, and that the assured must make his election speedily whether he would abandon or not, and put the underwriter into a situation to do all that was necessary for the preservation of the property, whether sold or unsold.] Here, the underwriters could not have notice before the sale, but through the medium of their agents at *Calcutta*. At all events, the notice by the broker to the underwriters after the arrival of the captain, was made in time. Although he reached *London* on the 25th *April*, the plaintiff did not receive the ship's papers until the 3d *May* following, from which alone could he be made acquainted with the nature of the circumstances which had transpired at *Calcutta*, and two days afterwards the notice was given. This, therefore, was within a reasonable time, for the assured are not bound to give an immediate notice, and what is a reasonable time depends on the circumstances of each particular case, and must be ascertained and decided by the Court. In *Hunt* v. *The Royal Exchange Assurance*, the delay was

(*a*) Park on Insurance, 6th edit. 239.

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five days, which the Court held to be too late; and in *Mellish* v. *Andrews*, it was nine days *viz.* from the 8th to the 17th *January*. [Mr. Justice *Richardson*.—Was it necessary for the plaintiff to wait for the ship's papers before he caused the notice of abandonment to be given?] It does not appear that the captain had any interview with him on his arrival; it must therefore be inferred, that the first satisfactory intelligence he received of the nature of the loss, was through those documents; and in *Gernon* v. *The Royal Exchange* (*a*), it was held, that the insured was entitled to a reasonable time for examining into the state of a damaged cargo, before he made his election to abandon, and Lord Chief Justice *Gibbs* there said (*b*), "It is perfectly true, that the insured are bound to make their election in the first instance, whether they will consider the loss as a partial loss, and keep the goods; or as a total loss, and give them up to the underwriters: that is the law in all cases, where the insured have their option to abandon or not. But it is equally true, that by the *first instance* is meant the earliest opportunity after they have examined into the state of the cargo; and they must have an opportunity of doing that, because it is only by the result of that examination that their decision can be ultimately determined." So here, the plaintiff had a reasonable time to make his election whether he would abandon or not, after he was apprised of the real state of the ship and cargo at *Calcutta*, which could only be obtained from the ship's papers. Under all the circumstances therefore, the verdict of the Jury was perfectly right, and cannot be disturbed.

Mr. Serjt. *Taddy* in support of the rule.—The first question is, whether under the circumstances, this was a case of extreme necessity, so as to justify the sale of the vessel at *Calcutta*. Lord *Hale* and Lord *Holt* were of opinion, that the master had no authority to sell a ship or any part of it,

(*a*) 2 Marsh. 88.——(*b*) Id. 90.

even in the case of strong necessity, without the consent of the owners; and that a sale by him transfers no property, but that he might hypothecate. *Tremenhere* v. *Tresilian* (*a*). *Johnson* v. *Shippen* (*b*). That doctrine was adverted to in argument, and not denied by the Court in the case of *Reid* v. *Darby*. In *Idle* v. *The Royal Exchange*, this Court thought, that the facts constituted a case of extreme necessity; but when their decision came before the Court of King's Bench on a writ of error, they doubted whether such an extreme necessity had been made out, and ordered a *venire de novo* (*c*). Here, however, no such necessity existed, for the ship was not only perfectly sea-worthy when she sailed on her outward voyage, but stood A 1 in *Lloyd's* list. Besides, *Calcutta* was a place well calculated for her to have been repaired at, and it appeared from the surveys which were made there, that she might have been easily repaired, although at a considerable expence. At all events, the captain might have raised money for that purpose by hypothecation, on depositing the freight bills and policies, the latter of which were effected at *Calcutta*, and were in his possession, as well as the former. It appears, too, that the ship, freight, and passage-money were valued at 13,000*l*. and she might have been repaired for between 4000*l*. and 5000*l*. and that the net proceeds of the sale was 1200*l*. only. It is therefore quite clear that the captain would not have acted as he did if she had not been insured; and his object in selling her was, that the loss might fall on the underwriters; and *Green* v. *The Royal Exchange Assurance* (*d*), established the prin-

(*a*) 1 Sid. 453. S. C. 3 Keb. 91. (*b*) 2 Ld. Raym. 984.

(*c*) Mr. Serjt. *Bosanquet*, *amicus curiæ*, observed, that when that case came on in the King's Bench, and he was about to argue for the plaintiffs in error, the Court called on the counsel for the defendant in error, to point out, from the facts as found by the special verdict, that the sale was absolutely necessary; and on his stating that it must be inferred to be so from the finding of the Jury, a *venire de novo* was awarded, for the purpose of ascertaining whether such necessity existed or not, and that the case had been since settled without going to trial on the *venire de novo*.

(*d*) 1 Marsh. 447. S. C. 6 Taunt. 68.

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ciple, that a captain would not be justified in selling a ship unless he would have done so, in case she had not been insured. Here, although he might have experienced a difficulty in raising money for her repair at *Calcutta*, still he should not have sold her, but apprised the owner of the situation in which he was placed, and have awaited his answer before he proceeded to the sale.—Secondly, with respect to the abandonment, it is quite clear that it was necessary under the circumstances, and the only question is, whether it was made in time. The vessel was not abandoned to the underwriters until the 5th *May*, and was made by parol through the medium of the broker who caused the insurance to be effected, and Lord *Ellenborough* has doubted whether a parol abandonment could be deemed sufficient or valid under any circumstances. The last survey appears to have been made on the 1st *September*, 1820, and there was no agent for *Lloyd's* at *Calcutta* who was authorised to receive a notice of abandonment. The agents there were only bound to communicate the facts which had happened to their principals, and it was equally the duty of the captain to have corresponded with the plaintiff (the owner) on the subject. Besides, the captain arrived in *London*, where the plaintiff resided, on the 25th *April* last; and it must be inferred, that he either saw the plaintiff, or communicated the nature of the loss to him before the 3d *May* following, and although he did not receive the ship's papers till that day, they were not necessary to enable him to give notice of abandonment, for he must have known long before, that the vessel had been sold, and more particularly so as the sale had taken place eight months before. The cases of *Mellish* v. *Andrews* and *Hunt* v. *The Royal Exchange Assurance*, are decisive to shew that the notice should have been given before the 5th *May*, as the captain arrived on the 25th *April* preceding, and the ship's papers could give no particular or positive intimation to the plaintiff of the exact nature or extent of the loss.

Lord Chief Justice DALLAS.—The Jury have found that the captain had a justifiable cause for selling the ship, and they found so on all the facts which were before them in evidence at the trial. It therefore becomes necessary to refer to them in the outset, and more particularly so, as endeavours have been made to impeach the conduct of the master, as if he had acted for his own benefit, or that of his owner, without having due regard to the interests of all concerned. Is there then any ground for such an attack? The ship was so materially damaged by encountering stormy weather on her homeward voyage, that he was obliged to return to *Calcutta*. How then, did he act on his return? It has been admitted, that the underwriters had agents there, who it appears were not authorised to accept a notice of abandonment, but they had other general duties to discharge for them. The nature of those duties was not known to the captain, and what could he do more as a man of honour and integrity, than give them notice of the disasters which had befallen him, in order to ascertain whether they would abandon or not. He could not abandon to the underwriters, for they were in *London*, and the agents might have at least transmitted the circumstances to them, and more particularly so, as there was no other person at *Calcutta* on their behalf, to whom an abandonment could be made. What, then, is the next step the captain took? Immediately after the notice to the agents, he submitted the ship to three regular surveys made by competent persons, and in the first instance requested the agents to send some person to attend and survey the state of the ship. These surveys were accordingly made, and one of the persons who attended at two of them, was the surveyor appointed by those agents. The captain at one time intended to repair the ship if it had been possible, and for that purpose made applications to several of the most respectable houses at *Calcutta*, who declined, under the circumstances, to make any advance; and the captain swore at the trial that he had no money, nor could he get any to go on with the repairs, and that it would

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have been an act of madness to have done so. Under these circumstances, the captain caused the ship to be put up to sale after a public advertisement for that purpose. The agents for *Lloyd's*, although on the spot, did not interpose or dispute the sale, nor did they at all communicate with the captain to impeach its validity. From the whole of the evidence, the Jury found, that the captain was perfectly warranted in the sale, and that he had acted for the benefit of all concerned. In *Milles* v. *Fletcher* (*a*), Lord *Mansfield* told the Jury, that " if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss;" and when that case afterwards came before the Court on a motion for a new trial, his Lordship said (*b*), " the captain, when he came to *New York*, had no express order, but he had an implied authority from both sides, to do what was right and fit to be done, as none of them had agents in the place; and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within his contract of indemnity;" and he concluded by stating, " I left it to the Jury to determine, whether what the captain had done was for the benefit of the concerned. If they had found that it was in words, where would have been the question of law?" So here, I left it to a most respectable Special Jury to say, whether the captain had acted for the best, and for the benefit of all concerned; and they found that what was done, was done in the exercise of an honest discretion. It was a question purely for their consideration, and of which they were fully competent to judge. I therefore see no reason to overturn the conclusion to which they have arrived. The only remaining question is, whether the notice of abandonment was given in due time. This must be considered with reference to the facts; and whether the finding of the Jury is warranted from the circumstances in this respect. They have found, that the captain exercised a

(*a*) 1 Dougl. 232.——(*b*) Id. 234.

sound discretion, and acted for the benefit of all concerned, and the rule, as to the notice, must not be too rigidly or severely followed. It is not necessary to give a notice at the earliest possible moment, but within a reasonable time, and what is a reasonable time the Court are to judge, which is not to be construed strictly, but must depend on the nature and circumstances of each particular case. Here, there was no evidence beyond the mere arrival of the captain; there was no proof of any previous correspondence between him and his owner respecting the loss, nor any communication between them immediately after his arrival, and as the plaintiff was not acquainted with all the facts until the 3d *May*, and the notice was given on the 5th, I am of opinion that it was within a reasonable time, and consequently that there is no reason to disturb the verdict.

Mr. Justice PARK.—My Lord Chief Justice has detailed the facts of this case so minutely, that I need only concur with him in thinking that the verdict found by the Jury was perfectly right. With respect to the first point, there seldom, if ever, has been a case of stronger necessity. The captain said, that it would have been an act of madness to have repaired the vessel, and that he could not obtain money for that purpose. Was he then to allow her to stay and rot at *Calcutta*? Or did he under the circumstances, act fairly or not? He immediately on his arrival there, wrote to the agents for *Lloyd's*, informing them of the state the ship was in, but it appears they were not authorised to accept an abandonment, but their surveyor attended at two different surveys, and it was found, that from 4000*l.* to 5000*l.* were necessary to repair the ship, which the captain stated he had no means of procuring. He was therefore justified in selling her, as it was the most advisable mode of disposing of her.—With respect to the notice of abandonment, although the rule is, that it must be made speedily, yet it is sufficient if it be made within a reasonable time; and it is immaterial

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whether it depends upon a point of fact or of law. In this case, his Lordship left it to the Jury to say whether under the circumstances, the notice was given within a reasonable time; he was of opinion that it had been; and they coincided with him, and adopted that opinion. The Court cannot assume without proof, that although the captain arrived on the 25th *April*, he went immediately to his owner; and it has been fully proved, that he did every thing that was fair and just, and I therefore think that the verdict was perfectly right. The rules as laid down by Lord *Mansfield* and Mr. Justice *Buller*, on this branch of the insurance law, although in some degree relaxed by recent decisions, appear to me to have been most wisely and justly founded, and ought not to be defeated on mere futile or technical objections.

Mr. Justice BURROUGH.—In this case, as in other actions, where the evidence is all on one side, and the Jury have found a verdict on the facts before them, it ought not to be disturbed; and here they were in full possession of all the circumstances at the trial. The conduct of the captain was thoroughly investigated and explained; and it appears to me, that they were perfectly warranted in finding that what he did was done for the best. As soon as he returned to *Calcutta*, he gave notice of his intent to abandon to the agents for *Lloyd's* there. They should at all events, have written to their principals, and informed them of the state the ship was in, and as it does not appear that they did so, it was a culpable neglect, and they did not resist, but seemed rather to acquiesce in the sale; and I very much doubt, whether persons who are avowed agents for *Lloyd's* can say that they are not authorised to accept abandonments. As to the first point therefore, it seems to me that the verdict was perfectly right. With respect to the abandonment, there was no evidence whatever that the plaintiff was made acquainted with the nature of the loss until the 3d *May*, and on the 5th

the notice of abandonment was given. In all the previous cases, the delay has been considerably longer, but every case of this description must depend upon its own particular circumstances; and there is no general or leading rule as to the precise time within which such notice must be given, but on reference to them, as coupled with the facts, I think the notice in this case was given within a reasonable time, and consequently that there is no ground whatever to disturb the verdict.

Mr. Justice RICHARDSON.—I am sorry to say that I think differently, and should wish the case to undergo a further investigation on both the objections which have been raised. First, as to the necessity of the sale, it is quite clear that the master has no authority to sell except in a case of extreme or absolute necessity, *viz.* in the greatest or almost insurmountable difficulties, or at all events, as would induce a prudent man so to act in case the vessel were not insured. What then was the necessity in this particular instance? The ship and freight were valued at 13,000*l.* and the net proceeds of the sale amounted to 1200*l.* only; if therefore the vessel were uninsured, the loss to the owner would have been 11,800*l.*, *minus* only the value of the stores, and she might have been repaired for between 4000*l.* and 5000*l.* Besides, *Calcutta* is a place well calculated for repairing ships, and although money could not be easily obtained for that purpose, still it does not appear that the captain attempted to sell or hypothecate the cargo, which he might have done. It therefore seems to me to be a strong thing to say, that if he had not been insured, he would have so speedily abandoned and sold the ship for so small a sum as 1200*l.* My Lord Chief Justice and my two learned Brothers seem to think that the Jury have concluded this point by their verdict. There can be no doubt but that the captain acted fairly and honestly, but it should have been left to them, putting the insurance entirely out of the question, whether he

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acted for the benefit of all concerned. I am clearly of opinion that a notice of abandonment was necessary, although the ship was sold, and the only question is, was it given in time? The correspondence, if any, between the captain and his owner, remains in a state of obscurity. The former arrived in *London* on the 25th *April*, where the plaintiff resided, and it does not appear whether he had any communication with him. I should think that after so great a misfortune had befallen him, he would have seen his owner immediately: and if he did, the notice of abandonment would have been too late, as it was not given until ten days after his arrival. Although justice may have been done, and it may be hard to press against the assured, yet I do not think it necessary that the owner should have waited until he received the ship's papers before he made the abandonment, if the facts had been previously communicated to him by the captain. It would therefore be more satisfactory to me if it were submitted to another Jury to ascertain those facts, *viz.* whether the captain acted as though the vessel was uninsured, and for the benefit of all concerned; and whether he had any communication with his owner on or shortly after his arrival in *London*; in which case it appears to me, that the notice of abandonment would not have been given in time.

Rule discharged.

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Wednesday, Nov. 28.

THIS was an action on the case. The first count of the declaration stated, that on the 14th *February*, 1820, the plaintiff, at the request of the defendants, shipped and put on board a vessel of theirs called the *Eliza and Jane*, then lying in parts beyond the seas, to wit, at the island of *St. Michael's*, 376 boxes of oranges of the plaintiff, of the value of 1000*l.* to be safely and securely carried and conveyed in such vessel from *St. Michael's* to *London*, for certain reasonable reward to be therefore paid by the plaintiff to the defendants; and that it thereupon became the duty of the defendants, as such owners, safely and securely to carry and convey the oranges from *St. Michael's* to *London*, and for that purpose to prepare and provide all things necessary in that behalf; and amongst other things to procure a proper and skilful master or captain, for the purpose of conveying the oranges from *St. Michael's* to *London* with safety and security; yet that the defendants, not regarding their duty as such owners in that behalf, did not nor would safely and securely carry and convey the oranges in their vessel from *St. Michael's* to *London*, nor did they, as such owners, procure a proper and skilful master or captain in that behalf, but therein wholly made default, and on the contrary thereof, employed an unskilful and improper master or captain, by and through whose misconduct, carelessness and negligence in delaying the voyage, and the arrival of the vessel at her port of destination, the oranges so laden on board thereof at *St. Michael's*, and being of the value aforesaid, were damaged, rotten, and spoiled, and were

The owners of a ship for whose benefit she is navigated, are bound to owners of goods shipped and received on board to be carried, for the due carriage thereof, and are liable for any negligence on the part of themselves or their servants whereby such goods may be damaged, although in the due course of the ship's employment the master makes a charter-party under seal;—because the shipowners are not charged directly upon the contract of charter-party, but upon their general liability as principals in the adventure, and deriving profit from the ship's employment. Where, therefore, a cargo, consisting of oranges, had been materially damaged through the improper conduct of the captain, who was also a part-owner of the vessel, and the freighters brought an action on the case against him and his co-part-owners for negligence in the conveyance of the goods:—Held, that such action was well brought, although the captain had entered into a charter-party under seal with the freighters, by which he engaged to convey the cargo to its port of destination;—it not appearing from that instrument, that he possessed any other character or interest than that of commander or master.

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wholly lost to the plaintiff, whereby he not only lost the oranges and large gains which he might otherwise have made of the same, but was put to great expence and inconvenience from the want of them. The second count stated, that the defendants being owners of the vessel, the plaintiff shipped and the defendants accepted on board her, at *St. Michael's* 376 boxes of oranges of the plaintiff, of the value of 1000*l.* to be safely and securely conveyed therein direct to *London*, and there to be delivered to the plaintiff, for certain reasonable reward to be paid the defendants in that behalf, whereupon it became their duty, as such owners, safely and securely to convey the oranges from *St. Michael's* direct to *London*, and to procure a skilful, competent, and proper master or commander to prosecute the voyage in that behalf; yet that the defendants, not regarding their duty as such owners, did not nor would safely convey the oranges, or cause them to be safely conveyed from *St. Michael's* direct to *London*, nor did they procure a skilful, competent, or proper master or commander to prosecute the voyage, but on the contrary thereof, employed so improper and unskilful a master and commander in that behalf; that by and through his unskilful and improper conduct in not proceeding from *St. Michael's* direct to *London*, that the oranges were perished, rotten, deteriorated in value, spoiled, and wholly lost to the plaintiff. There were other counts, stating that the oranges should have been conveyed by the defendants in their vessel from *St. Michael's* to *London*, and there delivered to the plaintiff within a reasonable time, and that they were not safely conveyed, through the carelessness and negligence of the master in delaying the voyage. The defendants pleaded Not Guilty.

The cause came on for trial before Lord Chief Justice *Dallas*, at *Guildhall*, at the adjourned Sittings after *Michaelmas* Term, 1820, when the Jury found a verdict for the plaintiff, damages 110*l.*; but his Lordship reserved the point for the opinion of the Court, as to whether the action

was maintainable or not, and a rule to shew cause having been accordingly obtained by Mr. Serjt. *Vaughan* in the last *Hilary* Term, that this verdict might be set aside and a nonsuit entered, the Court, after argument by him and Mr. Serjt. *Taddy* in support of the rule, and Mr. Serjt. *Lens* against it, directed the facts to be turned into the following case :—

The plaintiff is an orange merchant residing at the island of *St. Michael's*, in the *Azores*. The three defendants are owners of the ship *Eliza and Jane*, of *London*, and *Jenking* was also the master of that vessel, on a voyage from *St. Michael's* to *London* with a cargo of oranges shipped by the plaintiff, under a bill of lading signed by the defendant *Jenking* (*a*). By charter-party under seal, of the 24th *September*, 1819, between the defendant *Jenking*, as commander of the *Eliza and Jane*, then lying in the port of *London*, of the one part, and *John Adam* and the plaintiff, as freighters, of the other, *Jenking* covenanted that he, as commander, or some other proper person in his stead, should receive a full cargo on board at *London*, and being dispatched therewith on or before the 5th *October* then next, should with all possible speed proceed to *St. Michael's*, where the commander should immediately give notice to the agents of the freighters, and make a true delivery of the cargo, agreeably to bills of lading; and on the completion of the delivery, immediately receive on board from such agents, all such quantities of fruit in boxes as they should think fit to load (not exceeding, &c.); and being dispatched therewith, should immediately return direct to the port of *London*, where, being arrived and ready to deliver, the commander should give immediate notice thereof in writing to the freighters, and make a true delivery of the whole of the cargo, agreeably to bills of lading. And the commander further agreed, that the vessel should lay at *St. Michael's* for the purposes of delivering the outward and receiving the homeward cargo, 35 days, if required. Then followed covenants by him for

(*a*) For the form of this bill of lading, see *Thomson* v. *Adam*, ante, vol. v. 280.

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most imminent danger; and from his constant state of inebriety, protracted the voyage, even after he came in sight of land. On the vessel's arrival at *Penzance*, she was obliged to put in there for provisions, and sailed again, when in consequence of its blowing hard, *Jenking* returned again to that place, where he had the vessel cleaned and burnt, instead of proceeding direct to *London*, where she did not arrive until the 5th *May*, 1820. The cargo, although originally shipped in a high state of perfection, was on its arrival found to be much damaged. If those delays had not been caused by *Jenking*, the vessel would have arrived in the month of *March* preceding, when oranges were worth 2*l.* 10*s.* *per* box; whereas, from the bad state in which they were found, they only averaged 1*l.* *per* box.

The question for the opinion of the Court was, whether this action were maintainable or not; if it were, the verdict was to stand; if not, a nonsuit was to be entered.

The case came on for argument on a former day in this Term, when

Mr. Serjt. *Lens*, for the plaintiff, submitted, that the action was well brought against the three defendants as owners, independently of the charter-party entered into by *Jenking* as the commander of the vessel, which was not for himself and others, or as owner, but in his capacity of commander alone. It does not appear in any part of that instrument who the owners were; nor does it contain any covenant as to the conduct or misconduct of the captain, which is the sole ground of the present action. It may be objected however, that the plaintiff's remedy, if any, is exclusively on the charter-party against *Jenking* as the commander, and not against him and the two other defendants as owners. If the action were brought for the breach of any of the stipulations in the charter-party, it is true, the plain-

tiff could not abandon his remedy by covenant, and resort to *assumpsit* or case; for where there is a remedy of a higher description, recourse must be had to that alone. This case however, does not fall within that principle; for the plaintiff contracted with *Jenking* in his character of commander, and not as a part-owner; and whether he could bind his co-part-owners by the charter-party or not, is another question. The contract was not made between the same parties, nor with the defendants as owners; for two of them were not even named in the charter-party, and *Jenking* only stipulated to perform certain covenants, as master or commander of the vessel; and if this action were not maintainable, the plaintiff would have no remedy whatever against the owners, and the conduct of the captain forms no particular covenant in that instrument. The subject-matter of the action therefore, is wholly different from the charter-party, and founded on a collateral duty cast on the owners as such. Although in *Schack* v. *Anthony* (*a*), it was decided, that the owner of a vessel could not maintain *assumpsit* for freight, where there was a charter-party under seal for the payment of it, between the master as such, and the freighter; yet there, the charter-party was entered into, and the master acted as agent for the owners for the delivery of the goods to the consignees on a stipulated freight, and he therefore had power to bind his owners, and render them liable for his acts; and Lord *Ellenborough* there said (*b*), that "a contract under seal was entered into by the captain on behalf of the plaintiffs (the owners), with one of the partners in the house of the consignees; after which the plaintiffs chose to bring an action of *assumpsit* against that very partner for the identical thing already contracted for with their own captain." There too, the interest of the parties was the same, and the one as the agent for the others, stipulated for the delivery of goods on the payment of freight. Here however, the action is founded on *tort*, as the plaintiff has

(*a*) 1 Maul. & Selw. 573.——(*b*) Id. 575.

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sustained an injury through the misconduct of the captain alone; and although he was a part owner, still the other two defendants were answerable for his acts. In *Kinlyside* v. *Thornton* (*a*), it was held, that a lessor had his election to bring either an action on the case in nature of waste, or of covenant against a lessee who covenanted to yield up the premises in repair at the end of the term; for the lessor had a remedy by the common law, as well as on the covenant or contract of the lessee. So, here this may be considered as a tort arising out of a contract, in which case the plaintiff may have his remedy either against the captain or the owners. Although the captain acted for them, he could not bind them by any covenant in the charter-party; and even if there had been a covenant there applicable to his conduct, still it would not bar the plaintiff from suing in this action, which is founded on the custom of the realm, and more particularly so, as the owners are the only responsible persons. The cases of *Max* v. *Roberts* (*b*), and *Weall* v. *King* (*c*), do not appear to bear on the present question, whilst that of *Kinlyside* v. *Thornton* is expressly in point to shew that the plaintiff may resort to different remedies against different parties; and the charter-party entered into by *Jenking* does not affect him as part owner, but can only operate against him as master or commander, and no liabilities whatever could attach to the owners, by any of the covenants contained in that instrument.

Mr. Serjt. *Taddy*, for the defendants, submitted, first, that this action could not be maintained against the defendant *Jenking* alone; and, secondly, if it could not, it would not lie against him jointly with the two others. In order to shew this, it is only necessary to look at the declaration, charter-party, and facts, as found in the case. In the first count, the breach is founded on the delay of the voyage, and the second is for not proceeding from *St. Michael's* direct to

(*a*) 2 Sir Wm. Blac. 1111.——(*b*) 12 East, 89.——(*c*) Id. 452.

London; and the two leading provisions in the charter-party refer immediately to these particular points; for by the first the captain covenanted, on being dispatched with a cargo at *St. Michael's*, to return direct to *London*, and there make a true delivery of the whole of such cargo, and he then covenanted as to its being properly managed while on board the vessel, and that she should be properly fitted and provisioned for the voyage; and it has been expressly found, that the chief cause of the delay was the misconduct of the captain, in not having the vessel properly victualled when she left *St. Michael's*. It is a settled rule of law, that *assumpsit* or *tort* cannot be maintained if there be a remedy by a specialty, deed, or covenant; and here the plaintiff should have declared on the charter-party, as being the only available instrument against the defendants. The bill of lading was effected subsequently to the charter-party, and both these instruments were signed by *Jenking*, and have mutual reference to each other; for by the former, the freight was to be paid according to the charter-party. The consequence then is, that the plaintiff could only sue *Jenking* on his covenants in the charter-party, as the only remedy the defendants would have against the plaintiff would be by bringing an action against him for the breach of any stipulation contained therein, as to the shipment of the cargo or the payment of freight. The case of *Schack* v. *Anthony* is not only decisive of the present, but carries the principle much further, to shew that this action cannot be maintained; for there, although the captain was the agent of the owners, it was held, that he could not bind them by his covenants in the charter-party. In order to have rendered them liable on that instrument, he should have been authorized by deed, to enter into it on their behalf; for in *Thomson* v. *Brown* (*a*), it was held, that an obligation by deed cannot be discharged or altered but by deed; and as the captain of a vessel must be considered as an agent in a commercial point of view,

(*a*) Ante, vol. i. 358.

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he cannot bind his owners by a charter-party under seal, entered into between himself and the freighter, without a similar authority from his owners so to do. Although the declaration is framed in tort, it is quite clear that this action could not have been maintained against the defendant *Jenking* alone; for though laid in tort, the action is founded on contract, and must be incident to the same rules as are applicable to an action of the latter description, *Weall* v. *King* (*a*); and if it could not have been maintained as against the master, *a fortiori* it cannot, as against him jointly with the two other defendants; and as the action is commenced against three, and the charter party was entered into by one only, this is a fatal objection to the plaintiff's right to recover. So, *Max* v. *Roberts* (*b*), has established the principle, that although a plaintiff elect to sue in tort, where the complaint sought to be redressed arises out of a breach of contract, the same rule will hold as to the formality and strictness of proof, as though the action had been laid *ex contractu*. In *Kinlyside* v. *Thornton*, the tenant had committed actual waste, by pulling down and taking away fixtures which belonged to the premises, and was thereby guilty of a tort independently of the covenant, and the landlord was not thereby precluded from any remedy he might have against him on the covenant. Here, however, the plaintiff has sustained no injury independently of the covenants entered into by *Jenking* in the charter-party. The case of *Jones* v. *Hill* (*c*), however, is an express authority to shew, that an action on the case for permissive waste is not maintainable against a tenant for years, if he hold premises under an express contract or covenant to repair. So, in *Dyer* (*d*), it is laid down, that if a lessee covenants to repair, and does not, waste will not lie. It therefore appears, that waste can only lie for that which would be waste if there were no stipulation respecting it.

(*a*) 12 East, 452.——— (*b*) 2 New Rep. 434. S. C. (in error), 12 East, 89.——— (*c*) Ante, vol. i. 100.———(*d*) 198 (b), pl. 53.

And in *Coke-Littleton* (*a*), it is said, that an action of waste, independently of contract, against a lessee for life or years, did not lie against them at the common law, but was given by the statute of *Gloucester*. *The Countess of Shrewsbury's case* (*b*) does not press on the present; where it was decided, that if a man leases a house to another for life or years, either by deed or by parol, the lessee is not bound to repair it, without an agreement for that purpose; but the lessee, who had the use of it, ought to do so, though he was not subject to an action at the common law for not repairing it; for an action of this description could not be maintained against the defendant *Jenking* alone, as the plaintiff's only remedy against him was on the charter-party, and the two others must be jointly liable with him by the stipulations contained in that instrument, or not at all, as the tort must be considered as arising out of a contract, and therefore indivisible in its nature; besides which, the plaintiff has sustained no injury whatever independently of the covenants in the charter-party; and the duty of the master, as well as the liability of the owners, grows out of, and must be limited to that instrument alone. The case of *Rice* v. *Shute* (*c*) merely determined, that the non-joinder of a co-contractor can only be taken advantage of by plea in abatement; and in a late case of *Colvin* v. *Newberry* (*d*), which was an action of tort against the owners of a ship for not properly taking care of goods, and a charter-party was entered into between the freighters and the captain of the vessel, and a verdict was found for the freighters. On motion for a new trial, Lord Chief Justice *Abbott* was of opinion, that where there was a charter-party between the master and freighter, an action on the case would not lie on the implied undertaking of the owners that the goods should be safely and securely conveyed. [Mr. Justice *Burrough*.—Although the charter-party might bar the plain-

(*a*) 54 (b).——(*b*) 5 Rep. 13 (b).——(*c*) 5 Burr. 2611. S. C. 2 Sir Wm. Blac. 695.——(*d*) This case does not appear to have been reported.

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tiff as to any particular remedy he might have against the master, *Jenking*, independently of that instrument, could he not maintain an action of this description against the two other defendants, on their general liability as owners?] That will depend entirely on the nature of the action, and whether it be founded in contract or tort. If it be in substance of the latter description, it is quite clear, that one defendant may be acquitted, and the others found guilty, and that if some only are sued, they cannot plead in abatement the non-joinder of the others, whilst, if the action be founded on contract, the verdict must be either for all or against all. Although the present action partakes of the nature of both, still it is framed substantially on the contract. In *Boson* v. *Sandford* (*a*), which was an action charging the defendants with a breach of their duty as carriers, Lord *Holt* considered it to be *quasi ex contractû*. If so, it must be governed by the rules applicable to an action of contract; and the case of *Weall* v. *King* is expressly in point, to shew that such action could not be maintained. It is stated in the declaration, that the plaintiff shipped the cargo on board at the request of all the defendants, and that it thereupon became their duty to carry it safely. This therefore, was in the nature of a joint contract, and the consideration for such duty arose on a previous contract, which, to charge the defendants as owners, should have been entered into with all of them. The authorities on this point are of a conflicting nature (*b*); but here, as *Jenking* was part owner and master of the vessel, and executed the charter-party, and signed the bill of lading in his own name, the plaintiff's only remedy is against him, on the covenants contained in the former instrument, and he cannot resort to an action of this description, to render the two defendants liable with him, as part owners, as they were not parties either to the charter-party or the bill of lading.

(*a*) 2 Salk. 440. S. C. Skin. 278. Carth. 58. 1 Show. 101. 2 Show. 478. 3 Lev. 258. 3 Mod. 321.——(*b*) See *Buddle* v. *Willson*, 6 Term Rep. 369. *Govett* v. *Radnidge*, 3 East, 62. *Powell* v. *Layton*, 2 New Rep. 365; and *Max* v. *Roberts*, 2 New Rep. 454.

Mr. Serjt. *Lens*, in reply.—It is unnecessary to go into the distinctions between the cases of *Govett* v. *Radnidge*, and *Max* v. *Roberts*, as here the action was founded on a breach of duty, which was imposed on the defendants, and ought to have been performed by them in their character of owners, and which did not arise on an express or implied contract, for the law raises an obligation on them to see that a cargo put on board their vessel should be carried safely and securely. Besides, this action is maintainable independently of *Schack* v. *Anthony*, which is the only decision that seems to militate against it; for here the defendant *Jenking* did not enter into the charter-party, or sign the bill of lading for himself, as part owner, or as agent for the two other defendants, but in his character as commander only. He therefore, could not bind them by those instruments, even in a court of equity; and the plaintiff's cause of complaint is wholly beside the stipulations contained in the charter-party, although it may arise out of the same transaction. In *Weall* v. *King*, the gist of the action arose out of a contract, and *Max* v. *Roberts* was eventually decided on a defect in the declaration. In *Jones* v. *Hill*, the lessee covenanted generally to repair, and yield up the premises in as good condition as they were in when finished under the direction of a surveyor. He could therefore be only liable on his covenant, in which he had expressly stipulated to leave the premises in a certain state. Here however, the law raises an obligation in the first instance, on the defendants to carry the property of the plaintiff securely and properly, independently of the charter-party; and in *Kinlyside* v. *Thornton*, where the lessee had been guilty of an actual destruction of the premises, the lessor had his election to bring an action for waste, or sue him on the covenant to repair. So here, all the defendants were liable as owners, and *Jenking* alone as the commander of the vessel, and the plaintiff had his election, either to proceed against the former on their general responsibility, or the latter, on the express stipulations entered into by him in

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the charter-party. Besides, this action is maintainable against the defendants for a breach of duty imposed by the custom of the realm, and they might have assented to the terms of the charter-party after it had been entered into by *Jenking*, and more particularly so, as it was executed by him abroad, and in all probability he informed them of the nature of the contract he had entered into with the plaintiff, and he would have been liable to them for the freight.

The Court observed, that the case had been exceedingly well argued, and embraced a question of considerable importance, as the plaintiff had received the injury of which he complained through the misconduct of the captain, who was also a part owner; and they referred to the case of *Bretherton* v. *Wood* (*a*), to shew that the declaration was properly framed as for a misfeasance, and in which the action was founded upon a breach of duty imposed by the custom of the realm, which was considered to be a breach of the law; and they remarked, that it required consideration, whether the action was well brought against all the defendants, or whether it should not have been brought against *Wilson* and *Redhouse*, without making *Jenking* a co-defendant,

Cur. adv. vult.

Lord Chief Justice DALLAS on this day, having stated the declaration, and briefly recapitulated the circumstances of the case, delivered the judgment of the Court as follows:—

On these facts we are of opinion, that this action is properly brought. The owners of a ship, for whose benefit she is navigated, are bound by the maritime law to the owners of goods shipped and received on board to be carried, for the due carriage thereof, and are liable for any negligence on the part of themselves or their servants, whereby the goods may

(*a*) Ante, 141.

be damaged. If, without fraud, and in the due course of the ship's employment, the master makes a charter-party, the ship owners are not thereby divested of liability, but are still liable for the performance of such duties belonging to them, in that character, as are not inconsistent with the stipulations contained in the charter-party: and whether that instrument be made under the seal of the master or not, seems to make no difference in this respect; because the ship-owners are not charged directly upon the contract of charter-party, but upon their general liability as principals in the adventure, deriving profit from the ship's employment. A special action on the case, like the present, seems to us to be a proper form of action, for recovery of damages for the breach of such duties. A difficulty has been pressed upon the Court in the course of the argument, arising from the circumstance, that the defendant *Jenking* unites in himself the character of master or commander, and also of a part-owner. In the charter-party, however, he is not described as part-owner, but as commander only; nor does it appear that the plaintiff knew that he possessed any other character or interest than that of master or commander. It seems to us therefore, that this circumstance, thus unknown, cannot be set up, either by him or by the other part-owners, to bar the plaintiff of a right of action, to which he would otherwise have been entitled. In this view of the case, none of the questions are involved, in which so much difference of opinion has arisen, in those of *Govett* v. *Radnidge*, *Powell* v. *Layton*, *Max* v. *Roberts*, *Weall* v. *King*, and other cases of a like nature; for if this action is maintainable, as we think it is, against the defendant *Jenking*, as well as against the other two defendants, it is unnecessary to consider whether it could have been sustained against those two defendants alone, if it had not been maintainable against *Jenking*.

Judgment for the plaintiff.

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Wednesday, Nov. 28.

CARR, Gent. one, &c. *v.* SMYTHIES, Clerk.

Where the plaintiff, an attorney, claimed 21*l.* from the defendant, as his moiety of the expences for preparing a lease, and five years afterwards sued him for the recovery of that sum, and the defendant, before the delivery of the declaration, took out a summons to stay proceedings on payment of 15*l.* and the costs then incurred, which the plaintiff refused to accept, but proceeded in the action by delivering a declaration, and the defendant pleaded the general issue, and paid 15*l.* into Court, which the plaintiff afterwards took out in full satisfaction of his demand, the Court refused to deprive him of the costs incurred between the obtaining the rule and the taking the money out of Court, there being nothing oppressive or vexatious in the plaintiff's conduct.

THIS was an action brought by the plaintiff, an attorney, to recover the moiety of 42*l.* 15*s.* 10*d.* being the amount of his bill of costs for preparing a lease and counter-part of a farm taken by the defendant for a term of years, from one Mr. *Lempriere*, the expences of which were agreed to be paid in moieties by the lessor and the defendant as lessee. The lease was prepared in 1815, and the plaintiff delivered his bill to the defendant in *September*, 1820, and as the latter refused to pay its amount, he was served with process in this action in the month of *February* last. The defendant's attorney, on the 3d *April* following, and previously to the delivery of the declaration, took out a summons to stay proceedings upon payment of 15*l.* and the costs then incurred, which the plaintiff declined to accept, and proceeded in the action by delivering a declaration for work and labour in preparing deeds and giving attendances. The defendant pleaded the General Issue, and on the 15th *May* paid 15*l.* into Court, which the plaintiff took out on the 13th *November* instant, in full satisfaction of his demand, and gave an appointment to tax the costs, which was done on the same day, when the Prothonotary allowed the plaintiff all the costs incurred up to that time, amounting to 7*l.* 18*s.* 4*d.* although the defendant's attorney protested against such allowance, insisting that the plaintiff could not be entitled to any costs incurred subsequently to the taking out the summons to stay proceedings upon payment of the 15*l.* into Court. The above sum however, having been paid to the plaintiff without prejudice to any application to the Court,

Mr. Serjt. *Cross*, on the 24th instant, obtained a rule, calling upon the plaintiff to shew cause why so much of the rule of the 15th *May* last, as related to the costs, should not

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be discharged, and why it should not be referred back to the Prothonotary to tax the plaintiff's costs to the 3d *April* last, and also to tax the costs of the defendant incurred in this action subsequent to that day, and why the amount of such respective costs, when so taxed, should not be set-off the one against the other, and the balance only be allowed as between the parties, and that the plaintiff should refund such balance (if any) to the defendant or his attorney; and why the plaintiff should not pay the defendant his costs of this application. The learned Serjeant relied on the case of *James* v. *Raggett* (*a*), as being precisely in point, and cited those of *Zeevin* v. *Cowell* (*b*), *Roberts* v. *Lambert* (*c*), and *Johnson* v. *Houlditch* (*d*), as applicable to and strongly in favor of the motion. [Mr. Justice *Richardson* referred to the cases of *Burmester* v. *Hilch* (*e*), where the decision of this Court in *Roberts* v. *Lambert* was much doubted, and to *Draper* v. *Neill*, where an application similar to the present in principle, had been discharged on terms, on a previous day in this Term (*f*).]

(*a*) 2 Barn. & Ald. 776. S. C. 1 Chit. Rep. 471. ——(*b*) 2 Taunt. 203.——(*c*) Id. 283.——(*d*) 1 Burr. 578.——(*e*) 13 East, 551.

(*f*) DRAPER v. NEILL.

Monday, Nov. 19.

MR. Serjt. *Vaughan*, on the first day of this Term, obtained a rule *nisi*, that the defendant might be at liberty to pay into Court the sum of 47*l.* and that if the plaintiff should accept thereof, with costs, up to the 23d *June* last, he should pay the defendant the costs incurred since that time, the defendant having, on that day, tendered that sum to the plaintiff's attorney; but that in case the plaintiff would not accept thereof with such costs, that that sum might be struck out of the declaration. He founded his motion on an affidavit which stated, that the defendant was originally indebted to the plaintiff in the sum of 800*l.* but that such debt was afterwards reduced to 47*l.* by the defendant's giving goods and securities for the remainder to the plaintiff; that shortly after this arrangement, the defendant was arrested at the suit of the plaintiff, and two days afterwards obtained a summons to stay proceedings on payment of that sum and the costs of the action incurred previously to that time, which was tendered to the plaintiff at the Judge's chambers on the attendance of the summons, but which he refused to accept, stating that his demand amounted to 66*l.* and afterwards proceeded in the action by delivering a declaration. The learned Serjeant relied on the case of *Roberts* v. *Lambert*, as being precisely in point, and submitted,

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Mr. Serjt. *Lens* now shewed cause on an affidavit of the plaintiff, which stated, that in *October*, 1815, the defendant took a mansion, park, and farm belonging to Mr. *Lempriere*, on a lease for years, who agreed with the defendant that the expences of preparing that instrument should be borne equally between them; that such expences amounted to 42*l.* 15*s.* 10*d.* one moiety of which was immediately paid to the plaintiff by the lessor; that the plaintiff made repeated applications by letter to the defendant, for payment of his moiety, amounting to 21*l.* 7*s.* 11*d.* of neither of which did he take any notice, until the 14th *December* last, when he requested to have the particulars of the plaintiff's demand, which being furnished him, he took no further notice of it, in consequence of which, the plaintiff issued common process against him on the 7th *February* last, and on the 29th *March* following, he received a letter from the defendant's agents, informing him that the defendant objected to pay the moiety of the bill delivered to him, but desired the plaintiff to take a less sum, or submit the amount to a professional man. The learned Serjeant submitted, that under these circumstances, there was no ground whatever for the present application; that in *James* v. *Raggett*, the action was brought for two separate sums, one of which the defendant paid into Court, and the plaintiff afterwards finding that he could not support his action for the other part of his demand, took the money out of Court, and abandoning his other demand, discontinued the action, and the Court in effect considered that the sum paid into Court that the offer made by the defendant at the Judge's chambers, was equivalent to a tender.

Mr. Serjt. *Pell* afterwards shewed cause.

The Court referred to the cases of *Burmester* v. *Hilch*, and *Last* v. *Benton* (*a*), and observed that the defendant would receive no inconvenience by their not interfering, and that the tender should have been made previously to the issuing the writ; and they ordered the rule to be discharged, and that the costs of the application should be costs in the cause.

(*a*) 2 Marsh. 478.

was the only legal debt due to the plaintiff, and for which he could recover. The decision of the Court in *Johnson* v. *Houlditch*, was founded on the oppressive conduct of the plaintiff, by his keeping out of the way of the defendant, in order to prevent a tender. In *Gibbon* v. *Copeman* (*a*), a rule, in terms similar to the present, was granted on the authority of *Zeevin* v. *Cowell*, and *Roberts* v. *Lambert*, and discharged, as it appeared there was nothing oppressive in the plaintiff's conduct. So in *Burmester* v. *Hilch*, Lord *Ellenborough* said (*b*), "I see no reason for adopting a new rule of practice for sub-dividing the period for paying money into Court, and constituting a new stage of proceeding; unless we saw clearly in the particular instance, some contrivance or vexation on the part of the plaintiff." Here, so far from the plaintiff's conduct being oppressive, he has shewn the greatest indulgence to the defendant, as his cause of demand arose five years before the action was brought, and the lessor paid his moiety of the expences shortly after the lease and counter-part had been prepared.

Mr. Serjt. *Cross* in support of the rule.—The principle to be deduced from all the decisions is, that if on a summons to stay proceedings on payment of debt and costs, the plaintiff refuses to accept them, and the defendant brings them into Court, and the plaintiff afterwards proceeds in the action so as to compel the defendant to plead, it is oppressive and vexatious. Although the lease was prepared, and the plaintiff sent in his bill to the defendant in 1815, yet he was not furnished with the particulars of the demand until *December* last, and the action was commenced in the month of *February* following; and it was afterwards proposed to the plaintiff to refer the amount of his demand to some professional man, to which he objected, but delivered a declaration after the defendant had obtained a summons to stay proceedings on payment of a certain sum and the costs then

(*a*) 1 Marsh. 392. S. C. 5 Taunt. 840.——(*b*) 13 East, 552.

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incurred, and which sum the plaintiff afterwards thought proper to take out of Court, in full satisfaction of his claim. In *Burmester* v. *Hilch*, no vexation whatever was shewn; and although Mr. Justice *Le Blanc* said (*a*), that "the practice would introduce great uncertainty and vexation to the plaintiff;—as after an action brought, a sum might be tendered to the plaintiff's agent in town, who would not perhaps be apprised of the exact state of his client's demand in the country." Yet here the plaintiff himself was an attorney, and must therefore be taken to be fully cognizant of the practice of the Court; and under all the circumstances, his conduct has been oppressive as against the defendant.

Lord Chief Justice DALLAS.—I am of opinion, that on the result of the facts before the Court, there is no ground whatever for this application. The defendant obtained a summons on the 3d *April*, that the proceedings in this cause might be stayed, on the payment of 15*l*. with costs, to be taxed by the Prothonotary, which the plaintiff refused to accept, and on the 15th *May* following the defendant paid that sum into Court, which the plaintiff took out on the 13th *November*, and the Prothonotary, on taxation, allowed him costs to that time, in consequence of which the present application was made, and that it might be referred back to the Prothonotary to tax the plaintiff's costs up to the 3d *April* only, being the day on which the summons to stay proceedings was obtained by the defendant. He should have pursued the course as pointed out by Lord *Ellenborough* in *Burmester* v. *Hilch* (*b*), *viz.* have tendered the sum admitted to be due before action brought, and then he might have pleaded the tender, and paid the money into Court: and Mr. Justice *Le Blanc* there said (*c*), "without a strong case made out to shew an intentional vexation and view to enhance expence on the part of the plaintiff, there seems to be no ground for the Court to interfere out of the

(*a*) 13 East, 553.——(*b*) Id. 552.——(*c*) Id. 553.

ordinary course." The leading principle in all the cases, where an application of this description has been granted, appears to me to be founded on an intentional or manifest vexation on the part of the plaintiff. Such vexation however, is not to be presumed by the Court, but must be fully and clearly made out by the party making the application. Here, the plaintiff's demand arose so long ago as 1815, and instead of any intention on his part to vex or harass the defendant, it appears to be quite the reverse, for the interest on the original debt would amount to one-fourth of the principal. Under all the circumstances therefore, the Court cannot presume that there was any thing vexatious or oppressive in the plaintiff's conduct, and this rule must consequently be discharged.

Mr. Justice PARK.—On the facts of this case, every idea of oppression on the part of the plaintiff is negatived, and the Court cannot presume vexation. A plaintiff seldom attends at a Judge's Chambers on a summons to stay proceedings on payment of money into Court; and although the defendant there offered to pay 15*l.* and the costs, which offer was then refused on the part of the plaintiff, yet he might afterwards have considered it better to take that sum than proceed further with the action. The rule in this case is framed from that of *Johnson* v. *Houlditch*, but three motions of a similar description have been made in this Court since I have had the honor of sitting in it. The first was *Last* v. *Benton* (*a*), where Lord Chief Justice *Gibbs* adopted the language of Mr. Justice *Le Blanc* in *Burmester* v. *Hilch*, where he stated the great inconvenience which would arise from the interference of the Court, unless a strong case were made out of intentional vexation on the part of the plaintiff; and his Lordship observed (*b*), that "where the defendant might have made a regular tender, and has not done so, it is better to leave it to the regular course." That principle was recognized and adopted

(*a*) 2 Marsh. 478.——(*b*) Id. 479.

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by my Lord Chief Justice, in the absence of Lord Chief Justice *Gibbs*, in *Jones* v. *Johnson* (*a*), and was afterwards adhered to in *Aspinall* v. *Smith* (*b*).

Mr. Justice BURROUGH.—Every one who wishes to disturb the ordinary practice of the Court, should at least shew

(*a*) JONES v. JOHNSON.

E. T. 57 Geo. 3.

Thursday, May 1.

MR. Serjt. *Copley* moved, that on payment of the sum of 20*l.* into Court, together with 10*l.* for the costs incurred in this action previous to the 22d *April* last, all further proceedings should be stayed, if the plaintiff would accept that sum in full satisfaction of his demand, and that he should pay to the defendant his costs incurred subsequently to that day; and that if the plaintiff should refuse to accept that sum, it might be paid into Court, and struck out of the declaration. He submitted, that although the case of *Gibbon* v. *Copeman* (*), seemed adverse to the application, still, that there it appeared the sum offered was not a good tender; but here an absolute sum was ready to be paid into Court after the commencement of the action.

Mr. Justice DALLAS.—The principle on which this Court as well as that of the King's Bench have lately acted is, that they will not interpose in cases of this description, unless the conduct of the plaintiff has been fraudulent or oppressive. Here the tender should have been made previously to the commencement of the action, instead of which it was allowed to proceed until the 22d *April*, when it appears the defendant's attorney applied to the plaintiff's agent to settle it, and tendered 20*l.* in satisfaction of the debt, and 10*l.* for the costs, which the latter refused to accept. That tender therefore, was made too late, and there appeared to be no oppression whatever on the part of the plaintiff.

The learned Serjeant therefore took nothing by his motion.

(*b*) ASPINALL v. SMITH.

M. T. 59 Geo. 3.

Monday, Nov. 16.

MR. Serjt. *Best* applied for a rule *nisi*, that on payment of the sum of 8*l.* into Court by the defendant, and whatever sum might be due to the plaintiff for the costs already incurred in this suit, he should not pay to the defendant the further costs thereof, in case the plaintiff should consent to take out of Court the money paid in, in full discharge of his demand, together with the costs of this application; and he relied on the cases of *Zeevin* v. *Cowell* and *Roberts* v. *Lambert*.

But Mr. Justice *Park* referred to the case of *Last* v. *Benton*, where this Court adopted the rule laid down in *Burmester* v. *Hilch*.

The learned Serjeant therefore took nothing by his motion.

(*) 1 Marsh. 392.

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some reasonable ground for so doing. The practice in cases of this description seems to be clear and established on principle. Here, the defendant has not shewn that there has been any oppressive conduct on the part of the plaintiff, and there is no foundation for the Court to presume oppression or vexation by him. It appears that the lessor paid the plaintiff his moiety of the charges for executing the lease shortly after the delivery of his bill; and although the defendant might have considered some of the charges unreasonable, he might have objected to them and tendered what he thought the plaintiff might be entitled to, previously to the commencement of the action. If he had so done, the Court would have afforded him the relief he now requires; but under the circumstances, I think there is no ground whatever for this application.

Mr. Justice RICHARDSON.—I entirely concur with the rest of the Court.

Rule discharged (*a*).

(*a*) See *Sawbridge* v. *Coxwell*, 4 Taunt. 255.

READ *v.* ISAACS.

Wednesday, Nov. 28.

THIS was one of thirty-eight causes, in which underwriters had agreed under a consolidation rule, to abide by the determination of the Court in the cause of *Read* v. *Bonham* (*b*), where the question as to whether the notice of abandonment had been given in due time was reserved for their consideration, and on which they confirmed the verdict found for the plaintiff at the trial.

Where several underwriters entered into a consolidation rule, to abide by the determination of the Court on a point reserved for their consideration at the trial of a cause, *viz.* as to whether a notice of abandonment had been given in due time:—the Court would not allow such rule to be opened on an affidavit, stating that the owner had received letters from the captain abroad, informing him of the loss and sale of the ship before the arrival of the latter in *London*; as notice should have been given to the plaintiff to produce such letters at the trial, or they should, at all events, have been adverted to by affidavit, when the motion was made to the Court on the point reserved.

(*b*) Vide ante, 397.

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Mr. Serjt. *Taddy* now applied for a rule *nisi* that the consolidation rule might be opened, on an affidavit which stated, that the plaintiff, as owner, had received three letters from the captain, relative to the state and sale of the ship, previously to his arrival in *London* on the 25th *April*, 1821, *viz.* on the 16th *March* preceding. The learned Serjeant submitted that the captain was not justified in selling the vessel at *Calcutta*, as no decision had gone to so great a length, and as it appeared that the case of *Idle* v. *The Royal Exchange Assurance* (*a*), had been settled without going down to trial on the *venire de novo* (*b*). He also observed that the question was important in itself, as no less than 13,000*l.* were depending on it.

Mr. Serjt. *Lens* and Mr. Serjt. *Pell* shewed cause in the first instance, and observed that the question left for the consideration of the Court, and on which the law of the case had been fully discussed, was fully disposed of by their judgment in the case of *Read* v. *Bonham*; and that the affidavit now attempted to be used to open the consolidation rule, should at least have been introduced when the motion was made. The question as to the notice of abandonment was peculiarly within the jurisdiction of the Court, and the Jury expressly found that the sale by the captain was for the benefit of all concerned. If the Court were to grant the present application, it would be not only inconvenient, but highly dangerous, as it would in terms, have the effect of granting a new trial, which the Court had but yesterday refused in the case of *Read* v. *Bonham*. Besides, the captain was fully interrogated at the trial, and if the defendant had been aware of the receipt of the letters by the plaintiff from him, he should have given the former notice to produce them, or at all events have stated by affidavit that he had received them when the motion to set aside the verdict was granted.

Lord Chief Justice DALLAS.—At the urgent request of the parties, I allowed the case of *Read* v. *Bonham* to come

(*a*) Ante, vol. iii. 115.——— (*b*) See ante, 467.

on at *Nisi Prius* out of its ordinary course in the paper, as otherwise it could not have been tried until the following Term; and from the applications which have been since made by the defendant, I shall not be easily induced to grant such an indulgence in future. Cause has been shewn to the present rule in the first instance, and if I entertained any doubt as to the justice of the case, I should wish time for further consideration; but as far as I am personally concerned, as well as in justice to the bar, if I thought the case of *Read* v. *Bonham* had been improperly decided, or that I had taken an imperfect view of it, or even if I now saw any reason to disturb the conclusion to which the Court have come, I should wish to send it down to a second trial; and more particularly so, as my Brother *Richardson* was of opinion that it ought to be reconsidered, as well as to the notice of abandonment as of the power of the captain to sell. It is important to consider that a consolidation rule is highly advantageous to parties, as it tends to prevent delay and unnecessary expence; and it appears to me to be equally important, that the case of *Read* v. *Bonham* was disposed of by the Jury in favour of the plaintiff on the facts before them, and afterwards by the Court, as to the point submitted to their consideration. When the motion to set aside the verdict was made, no affidavit was produced as to the receipt of the letters in question, nor was the attention of the Court drawn to any facts but those that appeared at the trial:—still, however, I do not say but that cases may occur, where a consolidation rule may be opened, but such rule should be considered as binding, if the Court are satisfied with the event of the cause which has been tried. We were of opinion, that under the circumstances, the captain was justified in the sale, and that opinion seems to have been warranted by former decisions, and must stand unimpeached until it be reversed by another Court. But the question did not depend altogether on the necessity of the sale, for it was admitted on all hands, that what the captain had done was for the benefit of all concerned; and a most respectable jury of mer-

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chants so found, and I think it would be too much for the Court to set aside their verdict in this respect. As to the question of abandonment, it resolved itself into a mere question of law, *viz.* whether it was given within a reasonable time or not. The agents of the underwriters at *Calcutta* would not accept such notice, although they took a part in the surveys, and never protested against the validity of the sale. Are we therefore now to give effect to a mere objection of form? If it went to the justice of the case, it would be entirely a different question. The ship was sold long before the defendant could have had notice of it, and it appears to me, that under all the circumstances, the notice given by the broker to the underwriters, of whom the defendant was one, two days after the ship's papers were received by the plaintiff, must be considered as reasonable. On these grounds therefore, I am of opinion that this rule must be discharged.

Mr. Justice PARK and Mr. Justice BURROUGH concurred.

Mr. Justice RICHARDSON.—Although I yesterday expressed a wish that the case of *Read* v. *Bonham* should undergo a further consideration, still, as the rest of the Court were satisfied that there was no ground for a new trial; and as it now appears to me that the verdict was perfectly right according to the justice of the case, I fully agree with them in thinking that there is no reason whatever for opening the consolidation rule.

Rule discharged.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN

HILARY TERM,

IN THE SECOND AND THIRD YEARS OF THE REIGN OF GEO. IV.

MEMORANDUM.

In the last Vacation, *viz.* on the 8th *December*, 1821, *William Elias Taunton*, *William George Adam*, *Christopher Puller*, *Edward Burtenshaw Sugden*, and *Lancelot Shadwell*, Esqrs. all of *Lincoln's-Inn*, were respectively appointed his Majesty's Counsel learned in the law, and on the first day of this Term, took their seats within the Bar accordingly.

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IN THE EXCHEQUER CHAMBER.

The KING *v.* THOMAS WATTS.

Upon an indictment for forging and uttering a forged acceptance to a bill of exchange in payment for goods which the prisoner had promised to pay for by an acceptance of a *London* banker; the bill was addressed to, and purported to be accepted by "Messrs. *Williams & Co.* Bankers, 3, *Birchin Lane, London*," and it was proved that Messrs. *Williams, Burgess, & Co.* Bankers, of No. 20 in that lane had not accepted the bill; and that there were no other bankers of that name in *London*; but there was no evidence to shew that Messrs. *Williams & Co.* of 3, *Birchin Lane*, had not done so:—Held, that this did not amount to a proof of forgery as against the prisoner.—A bill of exchange was addressed to and purported to be accepted by Messrs. "*W. & Co.* Bankers, *Birchin Lane*," and in the corner, at the foot of the address to them, the figure "3" was written in a small character, but it was not proved that it was on the bill at the time of its being uttered or dishonoured. On an indictment for forgery, professing to set out the bill in terms, the figure "3" was inserted as it appeared on the bill when it was produced at the trial:—*Quære* whether this was a variance.

THE prisoner was indicted for forging an acceptance to a bill of exchange, and tried before Mr. Justice *Best*, at the last Assizes at *Exeter*. The first count of the indictment was for forging at *East Stone-house*, in the county of *Devon*, on the 6th *April*, 1821, an acceptance by Messrs. *Williams & Co.* to a certain bill of exchange of the following tenor, *viz.*

"*Swansea Bank, March 28th*, 1821.

"£200.

"Two months after date, pay to Mr. *John Tipper*, or order, two hundred pounds, for value received, as advised.

"*Hy. Williams & Co.*

"*To Messrs. Williams & Co.*
Bankers, Birchin Lane,
London."

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with intent to defraud *Thomas Baylis, John Rutlidge*, and *Jonathan Ramsey*.

The second count was for uttering and publishing as true, the said forged acceptance on the said bill of exchange, knowing the same to be forged, with intent to defraud the said *Baylis, Rutlidge*, and *Ramsey*.

The prisoner was acquitted on the first count, and convicted on the second, the Jury having found him guilty of

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uttering the acceptance, knowing it to be forged. It was proved at the trial, that the prosecutors were millers, carrying on business in partnership, at *Stone-house*, and that the prisoner was the agent of *Philip Watts*, trading (under the firm of "*Philip Watts & Co.*") in lime, at *South Tawton*, and in corn, at *Ilfracombe*; that on the 6th *April*, 1821, the prisoner called at the prosecutors' mill, and agreed with *Baylis* for the purchase of one hundred sacks of flour for 240*l.*; and at the time he made the purchase, he agreed to pay for it by the acceptance of a *London* banker, and offered in part-payment, a bill, of which the following is a copy:—

"*Swansea Bank, March 28th*, 1821.

"£200.

"Two months after date, pay to Mr. *John Tipper*, or order, two hundred pounds, for value received, as advised.

"*Hy. Williams & Co.*"

"*To Messrs. Williams & Co.*
Bankers, 3, Birchin Lane,
London."

3 "Accepted *Williams & Co.* (*a*)"

On the prisoner's being asked how he proposed to pay the remaining 40*l.* he offered his own draft at two months on *Williams & Co. London*, and drew the following bill in the presence of *Baylis*, at the prosecutors' counting-house:—

"*South Tawton, April 6th*, 1821.

"£40.

"Two months after date, pay to our order, forty pounds, for value received, as advised by *Swansea* Bank.

"*Thomas Watts,*
for *P. Watts & Co.*"

"*To Messrs. Williams & Co.*
Bankers, Birchin Lane,
London."

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(*a*) This bill was indorsed by *Tipper* to *P. Watts & Co.* and by the prisoner as agent for them, to the prosecutors.

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The prisoner said he would send the latter bill to *London*, and get it accepted; and it was afterwards sent to the prosecutors, accepted in the same manner as the former bill for 200*l*. Whilst he was drawing the latter bill, *Baylis* asked him if *Williams & Co.* the acceptors of that for 200*l*. were *Williams, Burgess, & Co.* to which the prisoner answered "Yes." *Baylis* then replied "that it was improbable that there should be two firms of the same name in the same Lane, which consisted of so few houses," and the prisoner answered that "it was improbable." The figure "3" which stands between the words "Bankers" and "*Birchin Lane*" in the 200*l*. bill, was not then upon it, and *Baylis* did not observe whether the small figure "3" in the corner, was then on the bill or not. The notary who presented it for payment, did not see whether either of the figures "3" were then on it; but that if he had seen that number in the corner, it would not have led him to No. 3, *Birchin Lane*, as he should have thought that it was the number the holder had made when he had left it for acceptance, as it was the practice for those who deal in bills, to put a number on one corner, in order to know their own bills again, as there were frequently bills for the same sums left for acceptance, and that he should not have presented the bill at No. 3, *Birchin Lane*, unless he had been directed to do so, as that number did not appear to constitute part of the address of the drawees; that on his going there, he found that it was a stationer's shop, and that there was a private door with the words "*Williams & Co.*" on a large brass plate, which covered one-half of the door, and could be seen from the opposite side of the lane; that the person or clerk to whom he presented the bill, took it behind a desk, and turned over some books; and that he might then have had an opportunity of writing one or both of the figures "3" upon it, but the notary did not remark whether they had been inserted or not after the bill was returned to him. It was also proved, that the only *London* bankers by the name of *Williams & Co.* are Messrs. *Williams, Burgess, & Co.* at No. 20, *Birchin*

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Lane, who usually accept bills by the name of *Williams & Co.* but that the bill in question was not accepted by that firm, nor by either of the partners constituting it. No evidence, however, was adduced to shew by whom either of the bills given by the prisoner to the prosecutors, were accepted.

For the prisoner it was proved, that three bills drawn by him had been paid at No. 3, *Birchin Lane*, and of one of which the following is a copy:—

"*South Tawton, March 5th*, 1821.

"£30.

"Two months after date, pay to our order, thirty pounds, for value received.

"*Thomas Watts*,
for *P. Watts & Co.*"

"*Messrs. Williams & Co.*
Bankers, Swansea."

"Accepted Messrs. *Williams & Co.*
payable at No. 3, *Birchin Lane, London.*"

The other two bills differed only as to the dates and amount.

For the prisoner it was objected, first, that there was no proof that the acceptance of the 200*l.* bill was not the genuine acceptance of *Williams & Co.* of No. 3, *Birchin Lane*; secondly, as there was no evidence to shew that the figure "3" was on the corner of the bill at the time it was uttered, there was a variance between that instrument and the indictment, or that at all events it was incumbent on the prosecutors to shew that such figure was there when it was tendered to *Baylis* in payment for the flour. The learned Judge, however, left it to the Jury to say whether the acceptance of the 200*l.* bill was the acceptance of any *London* bankers, and whether it could be presumed that there were bankers at No. 3, *Birchin Lane*; but reserved the objections for the opinion of the Judges, and the question for their consideration was, whether under the circumstances, the prisoner had been properly convicted.

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The case was argued in the last Term, before eleven Judges (*a*), when

Mr. *C. F. Williams* for the prisoner, in support of the first objection, submitted, that the prosecutors should have shewn that the acceptance in question was forged, and that the prisoner uttered it knowing it to have been so. The bill appears to have been addressed to Messrs. *Williams & Co.*, 3, *Birchin Lane*, and purports on the face of it to have been accepted by them, and if the acceptance were written by them, the mere circumstance of their not being bankers, would not constitute the offence of forgery against the prisoner. The prosecutors should at least have proved, either that *Williams & Co.* did not accept the bill, or that no such persons resided at 3, *Birchin Lane*. From what passed in evidence it must be inferred that the acceptance was genuine; for when the notary presented the bill at 3, *Birchin Lane* for payment, the clerk did not deny it to be an acceptance of that house, nor did he say that it would not eventually be paid. Although the persons resident at No. 3, *Birchin Lane*, might not be bankers, they still carried on trade under the firm of *Williams & Co.*, and the bill was accordingly presented there for payment, and it appeared that three others had been previously honored, which were drawn by the prisoner on Messrs. *Williams & Co.*, bankers, *Swansea*, and accepted by them, payable at No. 3, *Birchin Lane*. He had therefore a right to suppose, that they were persons of opulence, and it was immaterial to him whether they were bankers or not. Although he said that "*Burgess*" was one of the firm, he might have done so in ignorance, as it cannot be supposed that he knew the names of all the partners in a *London* banking-house. The prisoner, when he tendered the accepted bill for 200*l.*, immediately proposed to draw another for 40*l.*, being the remainder of the purchase money, and no conversation whatever took place between him and the prosecutor *Baylis*, as to the names of the acceptors on the 200*l.* bill, until he

(*a*) Mr. Justice *Bayley* being absent at Chambers.

was drawing that for 40*l.*, and he then merely stated, that they were bankers in *London*. In the fair import of the word, persons transacting pecuniary affairs to a considerable extent, or discounting bills in *London*, might be considered by a person in the country as bankers, although they might not in reality be so. If the bill had been addressed to persons as drapers, or any other description of trade, and they turned out not to have been so, it would not constitute forgery, and the prisoner might have been mistaken in supposing that *Burgess* was one of the firm of *Williams & Co.* In the case of *The King* v. *Webb*, on an indictment for forging and uttering a forged acceptance, and the prisoner was tried before Mr. Justice *Best*, at *Salisbury*, at the *Summer* Assizes, 1819, and the bill was drawn by the prisoner, and addressed to "Mr. *Thomas Bowden*, baize manufacturer, *Romford*, *Essex*," and purported to have been accepted by him, payable when due at "No. 40, *Castle Street*, *Holborn*, *London*," and it was proved by the prosecutors, that no such person as *Thomas Bowden* ever resided at *Romford*, and that there was no baize manufactory there, and that he did not live at "No. 40, *Castle Street*, *Holborn*," and the prisoner produced witnesses to shew, that the acceptance was the hand-writing of *Thomas Bowden*, but that he had never carried on the business of a baize manufacturer at *Romford*, nor did he reside at "No. 40, *Castle Street*, *Holborn*," the learned Judge thinking that there was such a person as the acceptor, *Thomas Bowden*, and that the acceptance was his hand-writing, though with a false description, and knowingly uttered by the prisoner with intent to defraud, reserved the case for the opinion of the Judges, and they were of opinion, that although it was a case of gross fraud, it did not amount to forgery, as the acceptance was written by a person of the name of *Thomas Bowden*. So, in *Walker's case* (*a*), which was tried before Mr. Justice *Chambre*, at *Lancaster*, in

(*a*) See Evans's Collection of Statutes, vol. vi. 2d edit. part 5, cl. 12. page 93. S. C. Russell on Crimes, vol. ii. 1420.

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1807, it appeared, that a bill made by the prisoner, "*D. Walker*," (who was a pauper at *Manchester*), was dated "*Liverpool*," signed "*D. Walker & Co.*," and drawn on "*Devaynes & Co., London*, and it was proved that similar bills had been before drawn in the same manner, and being provided for before due, had been regularly paid, although the drawer was unknown to the house; that learned Judge ruled, that the evidence was not sufficient to go to the Jury. So here, the three bills drawn by the prisoner on *Williams & Co*, bankers, *Swansea*, and accepted by them, payable at "No. 3, *Birchin Lane*," where they were afterwards honored, is evidence to shew the existence of such a house there, and that the acceptors might be the same persons as the bankers at *Swansea*, to whom they were addressed; and more particularly so, as their names were on the door, and their clerk had a communication with the notary, when he presented the 200*l.* bill for payment, in which he did not deny the genuineness of the acceptance. In *Hevey's* case (*a*), where the prisoner assumed to be the real indorser of a bill, but there was no false making, it was holden not to be forgery, although the act was done in concert with the real indorser, and for the purpose of fraud, *viz.* to obtain credit in the name of another. These decisions clearly establish the principle, that in all cases of forgery, the thing made must be false; and that a mere fraud, or even wilful misrepresentation, made at the time of uttering a bill, will not constitute the crime of forgery, if there was no false making at the time the instrument was drawn. Secondly, there is a varianoe, between the bill, as set out in the indictment, and that proved at the trial; as it was not shewn that the figure "3" in the corner of that instrument, and under the address to the drawees, was inserted on it at the time it was uttered by the prisoner or presented by the notary for payment in *London*. On the contrary it appears, that the latter

(*a*) 2 East's Pleas of the Crown, 856. S. C. Russell on Crimes, 1420.

did not see it, even after the bill had been returned to him by the clerk at *Birchin Lane*, and the indictment professes to set out the bill in terms, and the insertion of that figure might tend to mislead the prisoner in his defence, and induce him not to obtain such evidence as might be necessary to prove the fact of Messrs. *Williams & Co.* residing at that particular place. If the figure "5" had been introduced in the indictment, and the bill on being produced, contained the figure "3," the variance would be fatal. So, if no figure had been inserted in the indictment, and "3" appeared on the bill, it would have been equally fatal; and here it is material to observe, that no person whatever saw the figure "3" written on the bill, until after it had been dishonored, and it might have been introduced without the knowledge of the prisoner. It is quite clear, that in an indictment of this description, the instrument must be set out with the greatest strictness, both in words and figures, and if by addition, omission, or alteration, a word is so changed as to become another word, the variance is fatal. In the case of *The Queen* v. *Drake* (*a*), which was an information for a libel, Mr. Justice *Powys* laid down the distinction, that "where a letter omitted or changed makes another word, it is a fatal variance: otherwise, where the word continues the same;" and Lord Chief Justice *Holt* said (*b*), "an information charging the defendant with making a writing *secundum tenorem sequentem*, there the written libel, and that set forth in the information, must exactly agree, because every word in the information is a mark of description of the very libel itself: So, in trespass *quare clausum fregit*, &c. if the plaintiff sets forth the abuttals and boundaries of his close, and fails in the proof thereof, he cannot recover; because he is obliged to prove his description, and there is no difference between wrongs done by words and by things." Here, if the figure "3" had not been inserted in the indictment, it would have been sufficient, as it was not proved to have been on the bill at the

(*a*) 2 Salk. 661.——(*b*) S. C. 3 Salk. 225.

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time of its being uttered or dishonored. In *Hoar* v. *Mill*(*a*), which was an action of covenant, and the plaintiff declared, that the defendant had demised to him "a wharf and *store-houses*," and the word in the deed was "*store-house*," it was held to be a fatal variance; and Mr. Justice *Le Blanc* there said (*b*), that "a distinction has always been observed betwixt setting out that which is the very ground of action, and that which may be rejected as impertinent matter;" and in *Boyce* v. *Whitaker* (*c*), it was held, that a literal mis-recital in setting forth a statute, is fatal, as "*utlegatum*," instead of "*utlagatum*;" and Lord *Mansfield* there said (*d*), that "if the defendant had unnecessarily set out the act of parliament, which it seemed to him he had, he would hold him to half a letter." There are several other cases which shew, that the addition or alteration of a letter has been deemed fatal, even in civil actions, and *à fortiori* the rule must be more strict in cases of a criminal nature. Thirdly, the learned Judge, in this case, left it to the Jury too indefinitely, as to whether the acceptance of the bill in question was the acceptance of any *London* banker; for the three bills produced by the prisoner were not denied to have been accepted by *Williams & Co.* bankers, at *Swansea*, or that they were not paid by them at No. 3, *Birchin Lane*, when they respectively became due. If it had been left to them, whether Messrs. *Williams & Co.* were living there, or carried on business as bankers there, and they had found that they did, the prisoner would be entitled to the benefit of such finding, even although they were not bankers; for they would thereby have negatived the forgery, and although the bill might have been uttered with a fraudulent intent, still, if the acceptance were genuine at the time, it would not amount to forgery by the prisoner.

Mr. *Gaselee*, for the prosecution. Even admitting that the bill in question might have been accepted by Messrs.

(*a*) 4 Maul. & Selw. 470.——(*b*) Id. 473.——(*c*) 1 Doug. 94.——(*d*) Id. 97.

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Williams & Co., at No. 3. *Birchin Lane*, still it appeared that they were not bankers, and that no persons of that description resided in that Lane, except Messrs. *Williams, Burgess & Co.* Although therefore, it might have been a genuine acceptance of the former, still, as the prisoner uttered the bill as being accepted by a *London* banker, he was guilty of forgery, and it was therefore properly left to the Jury, whether it was the acceptance of a *London* banker or not. It must be assumed, that the prisoner had full knowledge of the parties by whom the bill was accepted, before it was offered by him in payment for the flour, and as he agreed to make such payment by the acceptance of a *London* banker, he must have known that the acceptors were not bankers; and whether the bill was addressed to them at No. 3 or not, is altogether immaterial. In *Mead* v. *Young* (*a*), it was decided, that if a person of the same name with the payee of a bill to order, get possession of the bill, knowing that he has no title to it, and indorse his own name thereon, he is guilty of forgery. In *Hevey's* case, there was no false indorsement, the Jury having found that the indorsement was truly made by the real person, whose name it purported to be, and who was then in existence, and it did not appear that there was any other person of that name; but the prisoner there assumed a false name, and stated that he had indorsed it, as *Watts* in this case had said that the acceptors were bankers in *London*. The question is not whether the bill was accepted by *Williams & Co.* of No. 3. *Birchin Lane*, or whether there might not have been a clerk there, to represent the bankers of that name at *Swansea*, but whether it was uttered by the prisoner with a view to induce the prosecutors to believe, that it was the acceptance of *Williams, Burgess & Co.*, of No. 20, *Birchin Lane*. In *Parkes* and *Brown's case* (*b*), it was held, that the utter-

(*a*) 4 Term Rep. 28.——(*b*) 2 East's Pleas of the Crown, 963. S. C. 2 Leach's Crown Cases, 3d edit. 898. Russell on Crimes, vol. ii. 1417.

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ing of a note as the note of another person was a forgery, although such note was made in the same name as that of the prisoner; for it is a false making of an instrument in the name of a non-existing person, although before the time of the utterance, it was not so. So here, as the prisoner represented the acceptors to be bankers in *London*, with an intent to defraud, and there were no such bankers, as the acceptance on the face of the bill imported, except Messrs. *Williams, Burgess & Co.*, it was a forgery, and fell expressly within the meaning of the case of *Parkes* and *Brown*. With respect to *Walker's case*, it cannot be considered as an authority, as it is only to be found in *Evans' Collection of the Statutes*, from which it is cited by *Russell* in his *Treatise on Crimes*. But there it did not appear who *Walker & Co.* were, but merely that the bill was signed "*D. Walker & Co.*" and made by the prisoner, whose name was "*D. Walker*," and the Jury might have found whether the bill was issued with a fraudulent intent or not. Here, the only substantial bankers in *London*, by the name of *Williams & Co.*, were Messrs. *Williams, Burgess & Co.*, No. 20, *Birchin Lane*; and whether other persons of that name resided at No. 3, makes no difference, as the prisoner promised an acceptance on a *London* banker, and stated that *Burgess* constituted one of the firm. The conversation that took place between the prosecutor *Baylis* and the prisoner, goes strongly to shew that the latter knew that the acceptors were not bankers in *Birchin Lane*, or any other *London* bankers. It has, however, been said, that if the drawees had been described as drapers, or any other description of trade, and they turned out not to have been so, it would not amount to a forgery. That, however, would entirely depend on whether the bill was uttered with a fraudulent intent or not. As to the variance, the figure "3" must have been on the corner of the bill, when it was uttered by the prisoner; for if it had been drawn on *Williams & Co.*, bankers, *Birchin Lane*, generally, it would only have been presented at No. 20, in that lane,

as there were no other bankers but *Williams, Burgess & Co.*, carrying on business as such there. On the production of the bill at the trial it appeared, that the figure "3" was inserted on it in two places, and *primâ facie* it must be taken, that that between the words "bankers," and "*Birchin Lane*" was introduced at the time of making it. Although in the case of *Hoar* v. *Mill*, as well as in *Pitt* v. *Green* (*a*), where, in setting out a covenant in a lease, on which a breach was assigned, *viz.* the "*Cellar-beer*" field, instead of the "*Aller-beer*" field, the variance was held fatal; yet in *Morgan* v. *Edwards* (*b*), where leave was given by a lease to make pits, levels, and *soughs*, and a declaration in covenant stated it as a liberty to make *sloughs*, it was held to be immaterial; and in *Hamborough* v. *Wilkie* (*c*), which, in point of principle, is not distinguishable from *Hoar* v. *Mill*, where, in describing a deed in a declaration of debt as binding the covenantor, his *heirs*, executors and administrators, and by the deed it appeared that he bound himself, his executors and administrators only, without the word "*heirs*," it was held immaterial. In *Dunn's case* (*d*), where the prisoner gave a note in the name of another as her own, and assumed to be such other person, and the indictment set forth the tenor of the note, and included the witness's name at the end, and also the words "*Mary Wallace*, her mark;"—it was held well, although it was proved in evidence, that those additions were made after the prisoner had subscribed the note, but at the time of making it. So here, if the figure "3" had been added, it would have been immaterial; but at all events, it is properly set out in the indictment, as it appears upon the face of the note itself, and must be presumed to have been inserted on that instrument at the time it was made or uttered. Under the circumstances therefore, the question was most properly left to the Jury, and they were fully warranted

(*a*) 9 East, 188.——(*b*) 2 Marsh. 96.——(*c*) 4 Maul. & Selw. 474 (n).——(*d*) 2 East's Pleas of the Crown, 962, 976. S. C. Russell on Crimes, vol. ii. 1483.

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in convicting the prisoner on the second count of the indictment.

Mr. *Williams*, in reply. In *Dunn's* case, the name put to the mark at the bottom of the note was done by the direction of the prisoner, and the account she gave of herself was a fabrication throughout. That case therefore, does not touch this question; for *qui facit per alium facit per se.* The case of *Parkes* and *Brown* seems to have been somewhat doubted, and *Walker's* case appears to be in contradiction to it, and admitting that the acceptance was not made by *Williams & Co.*, bankers in *London*, still, as for any thing that appeared at the trial, it might have been the genuine acceptance of persons of that name residing at No. 3., *Birchin Lane*, it amounts only to a misdemeanor, and cannot render the prisoner amenable to the higher crime of forgery (*a*).

Cur. adv. vult.

No judgment was ever publicly given, but the prisoner afterwards received a free pardon, on the ground that no forgery was proved against him.

(*a*) The prisoner was committed, in the first instance, for a misdemeanor, in obtaining goods by a false pretence, under the statute 30 Geo. 2. c. 24.

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HENRY MACHIN and MARY VESSEY *v.* ELIZABETH REYNOLDS.

Where a testator was possessed of considerable personal property, and seised of an undivided third part in certain messuages and lands under a demise for lives, devised

THE following case was sent by the direction of the Vice-Chancellor for the opinion of the Judges of this Court:—

John Vessey was in his life-time, and at the time of his death, possessed of considerable personal property, and seised of an undivided third part in certain messuages, lands, tenements, and hereditaments, called *Upper Hexgrave Farm*, in the parish of *Southwell*, in the county of *Nottingham*, by the latter and all his real estate to his sister and nephew, for their joint lives, and to the survivor of them during her or his life, in case there should be no lawful issue living of them, or either of them, but in case both or either of them should leave any such issue, then to the survivor of the sister and nephew one undivided moiety only of the said real estate, for and during her or his life, and the rents and profits of the other undivided moiety to be paid and applied to the maintenance and education of all and every the child and children of either of them, the sister and nephew so dying, during their several minorities; and after the death of such survivor of the sister and nephew, the remaining moiety of the said estate was to be paid and applied in like manner, if there should be occasion, to all and every the child and children of such survivor of the sister and nephew, during their several minorities; and *when and as* such several children of the sister and nephew respectively, (if any such there should be) should respectively attain their age of twenty-one, then the whole of the said real estate was devised unto and equally amongst all such children of the sister and nephew respectively, share and share alike, if more than one, as tenants in common, and to their respective heirs and assigns for ever; and if but one, to such only child, his or her heirs and assigns for ever; but in case the sister and nephew should both die without *leaving issue* of her or his body, or there being such issue, they should happen to die under twenty-one, and without issue, then the said estate was given to *G. M.*, his heirs and assigns for ever.

The nephew and sister being the testator's co-heirs at law, and the former having one daughter, and the sister being unmarried, for the purpose of destroying the contingent remainders expectant on their life estates, by merger of such life estates in the reversionary estate, as co-heirs, by bargain and sale conveyed the premises discharged from all the contingent interest devised by the will to the uses therein declared; that is to say, to such uses as they should jointly appoint; and in default thereof, upon such further uses for the benefit of the nephew and sister respectively, as were therein mentioned:— Held, first, that the daughter of the testator's nephew took, upon the death of the testator and under his will, an estate in fee simple in remainder during the lives of the *cestui que vies*, in the undivided third part of the said messuages and lands comprised in the said indenture of demise, subject to be divested in part, by the birth of other children of the nephew and sister, or of either of them, and determinable altogether, in the event of her dying in the life-time of the nephew (her father), or under twenty-one, without leaving issue; secondly, that the conveyance did not pass any estate or interest which could in any way defeat or affect the remainder so vested in the daughter of the testator's nephew.

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virtue of an indenture of demise, bearing date the 22d *September*, 1798, whereby the said messuages, lands, tenements, and hereditaments, were demised to the said *John Vessey*, and two other persons therein named, their heirs and assigns; to hold to them, their heirs and assigns, as tenants in common, during the lives of the persons therein named. This being a freehold lease, livery of seisin was indorsed upon it. The said *John Vessey*, by his will, after giving various specific and pecuniary legacies, expressed his intention and will as to the residue of his real and personal estate, in the words and figures following: that is to say, "All the rest, residue and remainder of my personal estate and effects, of what nature or kind soever, or wheresoever the same may be, I give and dispose thereof as follows:—I give and bequeath the interest, dividends, and proceeds arising from such residue of my said personal estate, unto my sister *Mary Vessey*, and my nephew *Henry Machin*, during their joint lives, to be equally divided between them, share and share alike, to and for their respective use and benefit, and to the survivor of them, during her or his life, in case there should happen to be no issue living, lawfully begotten of them my said sister and nephew, or either of them; but, in case both or either of them shall leave any such issue, then I give and bequeath to the survivor of them, my said sister and nephew, one moiety or half part only of the interest, dividends, and proceeds of the residue of my said personal estate, for and during his or her life; and the other moiety or half part thereof, or such part of the same as shall or may be thought needful and requisite, by the executors or administrators of either of them, so dying and leaving issue as aforesaid; I will and direct shall be paid and applied for and towards the maintenance, education, and bringing up of all and every the child and children of such of them my said sister or nephew so dying, during their several and respective minorities; and from and after the death of such survivor of them, my said sister and nephew; I will and direct that the other moiety or half part of the interest, dividends,

and proceeds, or such part thereof as shall be thought proper by the executors or administrators of such survivor of them, my said sister and nephew, be applied in like manner, for and towards the maintenance, education, and bringing up of all and every the child and children of such survivor, during their several and respective minorities; and when and as such several children of them, my said sister and nephew (if any such there happen to be), shall respectively attain their age of twenty-one years, then I give and bequeath the whole of the residue of my said personal estate, unto and equally amongst all such children of them, my said sister and nephew, share and share alike; and if but one, then to such only child: and I will and direct that the person or persons who eventually may have the payment of the above shares, shall have due regard to the expenditure on such several and respective children during their minorities, in order to the division of my said personal estate being made as equal as possible amongst them. But if it should happen that my said nephew, *Henry Machin*, should only have issue living at the time of the death of the survivor of them, my said sister and nephew, then it is my will that such residue of my said personal estate be paid and applied in like manner, unto and amongst all his children, in such parts, shares, and proportions, manner and form, as he, my said nephew, shall by his last will direct or appoint; and in default of such will, then I give and bequeath such residue of my said personal estate unto and equally amongst all such children of my said nephew. Provided further, that in case my said sister and nephew both die without leaving any lawful issue of her or his body living, then I give and bequeath the whole of such residue of my said personal estate to such person or persons, and in such parts, shares, and proportions, manner and form, as the survivor of them, my said sister and nephew, shall by will appoint, and in default thereof, I give and bequeath such residue of my said personal estate unto my personal representatives. Also I give and devise all and every my real estate whatsoever and wheresoever, unto my said sister,

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Mary Vessey, and my said nephew, *Henry Machin*, for and during the term of their joint natural lives, and to the survivor of them two, during her or his life, in case there should happen to be no issue living lawfully begotten of them, my said sister and nephew, or either of them; but in case both or either of them shall leave any such issue, then I give and devise to the survivor of them, my said sister and nephew, one undivided moiety or half part only of my said real estate, for and during her or his life, and the rents and profits of the other undivided moiety of my said real estate, I will and direct shall be paid and applied unto all and every the child and children of either of them, my said sister and nephew, so dying during their several minorities, if there shall be occasion for it, in like manner as is hereinbefore directed, regarding the interest and proceeds of my said personal estate; and from and after the death of such survivor of them, my said sister and nephew, I will and direct that the remaining half part of the rents and profits of my said real estate shall be paid and applied in like manner (if there should be occasion), unto all and every the child and children of such survivor of them, my said sister and nephew, during their several minorities, and when and as such several children of them, my said sister and nephew respectively, (if any such there happen to be), shall respectively attain their age of twenty-one years, then I give and devise the whole of my said real estate unto and equally amongst all such children of them, my said sister and nephew, share and share alike, if more than one, as tenants in common, and to their several and respective heirs and assigns for ever; and if but one, to such only child, his or her heirs and assigns for ever; but in case my said sister and nephew shall both happen to die without leaving lawful issue of her or his body, or there being such, they should happen to die under the age of twenty-one years, and without issue, then I give and devise all and every my said real estate unto *George Mosely*, of *Farnsfield*, farmer, his heirs and assigns, for ever. And it is my will, and I hereby empower my said sister and

nephew, during their joint lives, and the survivor of them, to make any partition which they may deem proper of all or any part of my undivided estates, and to execute any deeds, or do any other needful acts which may be requisite for effecting such partition, as fully and effectually as if I had done the same; and lastly, I hereby constitute and appoint my said sister, *Mary Vessey*, and my nephew, *Henry Machin*, executrix and executor of this my will."

The testator died on the 3d of *February*, 1819, without having revoked or altered his will. *Henry Machin* and *Mary Vessey*, who remains unmarried, are his co-heirs at law. *Henry Machin*, at the death of the testator, had a daughter, *Elizabeth Susannah Machin*, who was then, and is now his only child.

On the 10th *October*, 1820, *Henry Machin* and *Mary Vessey* made an agreement in writing with the defendant *Elizabeth Reynolds*, whereby *Henry Machin* and *Mary Vessey* agreed to sell, and *Elizabeth Reynolds* agreed to purchase the said undivided third part of the said messuages, lands, tenements and hereditaments, devised by the will of the said *John Vessey*; and *Henry Machin* and *Mary Vessey* were by the said agreement bound to make a good title to the premises, and convey the same to the said *Elizabeth Reynolds*. In order to make title to the said hereditaments, by an indenture bearing date on the 20th *January*, 1821, and made between the aforesaid *George Mosely*, of the one part, and the said *Henry Machin* and *Mary Vessey*, of the other part: reciting the hereinbefore mentioned indenture of demise of the 22d *September*, 1798, and further in part reciting the will of the said *John Vessey*, and also, amongst other things, reciting that the said *Henry Machin* had contracted and agreed with the said *George Mosely* for the absolute purchase of all his interest and estate (if any), of and in the said undivided third part or share, late of the said *John Vessey*, of and in the said messuages, lands and hereditaments, comprised in the said indenture of demise theretofore recited, at the sum of 133*l.* 6*s.* 8*d.* being an appor-

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tioned part of 500*l.* to be paid for the contingent interest of the said *George Mosely*, in all the freehold, copyhold and leasehold estates of the said *John Vessey*, deceased, and that the said *Henry Machin* had consented that the same contingent interest should be released by the said *George Mosely* to the said *Henry Machin* and *Mary Vessey*, as thereinafter expressed, so that the same contingent interest might be forthwith extinguished and destroyed:—it was witnessed, that in pursuance and performance of the said recited agreement in this behalf, and for the consideration by the said *Henry Machin* and *Mary Vessey* respectively to the said *George Mosely* paid, as therein mentioned, the said *George Mosely*, with such privity, and by such direction and appointment, and upon such acceptance as thereby testified, remised and released to the said *Henry Machin* and *Mary Vessey* respectively and their respective heirs and assigns, all the estate, right, title, interest, use, trust, possibility, tenant right of renewal, and claim whatsoever, at law and in equity, of him the said *George Mosely*, of, into, out of, or upon all and singular the said one third part, late of the said *John Vessey*, of and in the messuage, lands, and hereditaments comprised in the said therein in part recited indenture of demise, or which he the said *George Mosely*, his heirs or assigns, or any person or persons rightfully claiming or to claim from, through, under, or in trust for him or them, should or might, at any time or times thereafter, have, claim, challenge, or demand of, in, to, out of, or upon the same undivided third part or share of the said messuage, lands, and hereditaments, or any part or parcel thereof, under or by virtue of the said will of the said *John Vessey*, so that the said *George Mosely*, his heirs and assigns, and all and every such person and persons as aforesaid, might, by force of the said indenture, be for ever excluded and debarred from all estate, right, &c. of, into, out of, or upon the same undivided third part or share of the said *John Vessey* deceased, in the said messuage, lands and hereditaments,

or any part thereof. And by certain indentures of lease and release, bearing date respectively the 21st and 22d *January*, 1821, and made between the said *Henry Machin* and *Mary Vessey*, of the one part, and *Robert Swan*, therein described, of the other part, reciting, among other things, the said indenture of demise for lives, and the will and death of the said *John Vessey*, leaving the said *Henry Machin* and *Mary Vessey* his co-heirs at law; and further reciting, that for the purpose of destroying the contingent remainders expectant on the life estates of the said *Henry Machin* and *Mary Vessey*, of and in the third part of the messuages, lands and hereditaments, comprised in the said indenture of demise, and given and devised by the said will of the said *John Vessey*, by merger of the life estates of the said *Henry Machin* and *Mary Vessey*, in their reversionary estate or interest of and in the same third part, as heirs at law of the said *John Vessey*:—it was witnessed, that in pursuance and performance of the said agreement, and upon such consideration as therein mentioned, the said *Henry Machin* and *Mary Vessey*, and each of them, granted, bargained, sold, released and confirmed unto the said *Robert Swan*, his heirs and assigns (in his possession then being, by virtue of a lease for a year, as therein mentioned), the said undivided third part or share, late of the said *John Vessey*, of and in the said messuage, lands, and hereditaments comprised in the said indenture of demise:—To hold the same unto the said *Robert Swan*, his heirs and assigns, for and during the natural lives of the persons named as *cestui que vies*, in the said indenture of demise, and the survivor of them, freed and discharged of and from all the contingent interest given and devised, in and by the said will of the said *John Vessey*, to the uses and upon the trusts therein limited, expressed, and declared, of and concerning the same, that is to say (among others), to such uses, upon such trusts, and for such ends and purposes, and with, under, and subject to such powers, provisoes, declarations and agreements, as the said *Henry*

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Machin and *Mary Vessey*, at any time or times, and from time to time, jointly, during their joint lives, by any deed or deeds, executed as therein provided, should jointly direct, limit, or appoint; and in default thereof, upon such further uses and trusts, for the benefit of the said *Henry Machin* and *Mary Vessey* respectively, as therein mentioned.

The questions for the opinion of the Court were, first, whether *Elizabeth Susannah Machin*, the daughter of *Henry Machin*, took any and what estate in the said undivided third part of the messuages, lands, tenements, and hereditaments, comprised in the said indenture of demise, upon the death of the said *John Vessey*, and under his said will? And secondly, whether the said *Robert Swan*, *Henry Machin*, and *Mary Vessey* respectively, took any and what estates, interest, or rights respectively, in the said messuages, lands, tenements, and hereditaments, under the said deeds, dated respectively the 21st and 22d *January*, 1821?

The case came on for argument in the course of the last Term, when

Mr. Serjt. *Hullock*, for the plaintiffs, submitted that the only question was, what estate the daughter of the devisee *Henry Machin* took in the messuages and lands comprised in the indenture of demise of the 22d *September*, 1798, and the other real property of the devisor on his death, and under his will. He contended, that she took a contingent remainder only. There are no cases applicable to the present, which must therefore be decided on the intent of the devisor, to be collected from the different expressions used by him throughout the will, from which it must be inferred, that the daughter of *Henry Machin* should not take any thing until after the death of her father; or in other words, that it was the object of the devisor, that none of the limitations over should take effect until the death of his sister or

nephew, the two devisees. The cases of *Forth* v. *Chapman* (*a*), *Read* v. *Snell* (*b*), and several others, have decided, that the words "*leaving issue*" have a confined relation to the time of the death of the party, and must be construed to mean a dying without leaving issue at the death of the parent, or first taker. Although the words "*when and as*," if applied to the period of a devisee's becoming of age, have been held not to operate as a condition precedent, but as the description of the time when the remainder-man is to take in possession, yet an interest does not vest until he has arrived at the age of twenty-one. *Doe*, d. *Wheedon* v. *Lea* (*c*). So, in the case of a legacy, where the gift and time of payment are both future, as if *A*. gives a legacy to *B*. *at and when* he comes of age, the time is annexed to the gift and substance of the thing, and if the legatee die before he comes of age, the legacy lapses (*d*). Here, though the testator has made two dispositions in his will, the one as to his personal, and the other as to his real property, he meant that they should both be disposed of in the same manner. With respect to the personalty, it is bequeathed "to his sister and nephew during their joint lives, and to the survivor of them for life, in case there should happen to be *no issue living* of them or either of them; but in case both or either of them *should leave* any such issue, then to the survivor a moiety for life, the other moiety to be applied for the maintenance of the children of the party so dying, during their minorities; and after the death of the survivor of the sister and nephew, the other moiety to be applied in like manner, for the maintenance of the children of such survivor, during minority, *and when and as* such children should attain twenty one, then the whole of the residue was given unto and equally amongst all such children, share and share alike." The words "*no issue living*," must be taken to mean no issue living at the death of the survivor of the sister or nephew.

(*a*) 1 Peere Wms. 663. 2 Eq. Cas. Abr. 292, pl. 16. 359, pl. 15. (*b*) 2 Atk. 642.——(*c*) 3 Term Rep. 41.——(*d*) See Roberts on Wills, 2d edit. vol. ii. 111.

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So, in case either of them should *leave any such issue*, can only apply to issue living at their deaths; and more particularly so, as the words "*when and as they should attain twenty-one*," if coupled with those of *issue living*, or *leaving such issue*, can only refer to children *in esse* at the time of the death of their respective parents, and it is impossible to say what issue of the two devisees might be living at that time. The same construction must prevail with respect to the devise of the realty, as the limitation over was in case there should be no issue living, begotten of the sister and nephew, or either of them. That must be confined to the issue living at their death, or the death of the survivor of them. So, in case either of them should leave any such issue, must be limited to those alive at the time of the death of their parents; for it is impossible to ascertain how many might be alive, after the death of the first takers. The remainders over therefore were clearly contingent, as they depended altogether on an uncertainty; and this is more manifest from the intent of the testator, *viz.* that none of the limitations over were to take effect till the death of his sister or nephew, and no inconvenience will arise by giving such a construction to the will; for although the Court might be inclined to give a preference to a vested remainder, the intention of the testator must prevail.

Mr. Serjt. *Pell, contrà*, admitted that there was no decision expressly applicable to this question, and that it must therefore rest on general principles, the leading one of which is, that the intention of the testator must prevail, and if that be the true criterion, there can be no doubt but that the present case is with the defendant. The simple abstract meaning to be collected from the whole of the will is, that the testator intended that the children of his sister and nephew, if more than one, should take equally at the deaths of their respective parents, and if but one, then that such one alone should take in like manner. If this be so, such intent

can only be carried into effect by the daughter of the devisor's nephew taking a vested remainder in the realty, subject to the life interests of her father and aunt, the provisions for maintenance during minority, and liable to be partially divested upon the birth of other children;—and consequently, it was not in the power of the sister and nephew to make a good title to a purchaser, which if the remainder be holden to be contingent, they would have effected by the conveyance in *January*, 1821. The mere intent however, does not of itself furnish a rule by which the Court must be guided, but there must be words in the will capable of carrying such intent into effect. It may be admitted, that the expression "*in case there should be no issue living*," must be taken to mean such issue as might be living at the death of the devisor's sister and nephew, when the limitations over were to take effect; but the case of *Forth* v. *Chapman* was impugned by Lord *Kenyon* in *Porter* v. *Bradley* (*a*). Here, the only question is, upon what contingency were the limitations over to take effect? That does not appear from any part of the will. On the contrary, the devise to the children is not confined by express words of contingency, and it must be inferred from the limitation over to *George Mosely*, that such children were to take in every other event than that upon which the estates were given to him, namely, the death of both the devisor's sister and nephew without leaving issue, or the death of such issue as they might leave under twenty-one years of age and without issue, which intent might not be effectuated, if the estates were to vest only in such children as should be living at the respective deaths of their parents. The words "*when*" and "*as*" are mere adverbs of time, and do not alter the nature of the interest, but apply only to the time when the remainder-man is to take in possession. In *Boraston's case* (*b*), the devise was as follows:—*when* the said *Hugh* shall come to his age of twenty-one years; and it was

(*a*) 3 Term Rep. 146.——(*b*) 3 Rep. 19.,

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held that the remainder was executed in him immediately after the death of the testator, and that it did not rest in contingency. So, in *Goodtitle*, d. *Hayward* v. *Whitby* (*a*), where there was a devise to trustees, in trust, to lay out the rents and profits of the devised premises for the maintenance and education of testator's nephews, and *when and as* they should respectively attain their ages of twenty-one, then to their use and their heirs, equally; it was held to be an immediate gift to the nephews, and vested in them immediately, with a trust to be executed for their benefit during their minority; and in *Doe*, d. *Wheedon* v. *Lea* (*b*), it was decided, that a devise to trustees till *A.* should attain the age of twenty-four, and *when* he should attain that age to him in fee, gave him a vested interest which would descend to his heirs, although he died before twenty-four. It is a well known principle, that the Courts favor vested interests; for in *Ives* v. *Legge* (*c*), Lord *Hardwicke* said "as the Court never construes a limitation into an executory devise, where it may take effect as a remainder, because the former puts the inheritance in abeyance; so neither does it construe a remainder to be contingent, where it can be taken for vested; because the latter tends to support the estate, and the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder by a fine or feoffment;" and in *Parkhurst* v. *Smith*, d. *Dormer*, (*in error*), Lord Chief Justice *Willes* said (*d*), "there are but two sorts of contingent remainders which do not vest, first, where the person to whom the remainder is limited is not *in esse* at the time of the limitation; and secondly, where the commencement of the remainder depends on some matter collateral to the determination of the particular estate." This case falls within neither of these descriptions, as the daughter of the devisor's nephew was *in esse* at the time of the limitation, and the commencement of the remainder did not depend on any

(*a*) 1 Burr. 228.——(*b*) 3 Term Rep. 41.——(*c*) 3 Term Rep. 489, n.——(*d*) Willes, 338.

collateral matter. Although the will is confused in terms and of doubtful construction, still, if the daughter of the nephew be held to take a vested remainder, subject to be divested in part by the birth of other children, it will not only effectuate the intention of the testator, but work no injustice to either of the parties.

Mr. Serjt. *Hullock*, in reply. If this question is to be governed by the intent of the testator, it is quite clear that the daughter of *Henry Machin*, the devisee, did not take a vested remainder in the realty, as equality of division appears to have been the testator's particular object, which would be altogether defeated by giving *Elizabeth Susannah Machin* a vested estate; for if she took such estate, subject to be divested in part on the birth of other children, if there were twelve, and all should die but two, the eldest child would be entitled to all the property, except one twelfth part, to which alone the second would be entitled. It is equally clear, that the limitations over to the children of the sister or nephew, were not intended to take effect until the deaths of their respective parents. The definition applicable to contingent remainders, as laid down by Lord Chief Justice *Willes*, in *Parkhurst* v. *Smith*, d. *Dormer*, is far too narrow, and as the number of children who may be living at the death of a parent cannot be previously ascertained, but depends entirely on an uncertainty, it must have the effect of creating a contingent remainder. In *Boraston's case* there was an express and immediate devise of a chattel to the testator's nephew, to be enjoyed by him when he arrived at a certain age. The fee therefore vested immediately, but here, the expression is, in case the devisees should "leave any issue," which must be confined to such issue as they might leave at their deaths. At all events, the testator meant that his real property should be disposed of in the same manner as his personal, and that both should be equally divided, which intent would be destroyed by the daughter of *Henry Machin* tak-

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had any previous dealings with *Parker*, they applied to the person who ordered the goods for a reference, and he accordingly referred them to a respectable merchant in the city, who fully satisfied them as to Mr. *Parker*'s responsibility, and the package containing the goods was accordingly directed to him by the name and description of "Mr. *James Parker, High Street, Oxford*," and taken by their porter to the defendant's waggon office, who paid for the booking it as a common parcel, although the value of it was 89*l.*—and the porter, who could read, swore that he never saw any notice in the defendant's office, as to his not being answerable for the loss of any package, if the value exceeded 5*l.* unless the same was specified when delivered into the office. It was also proved, that Mr. *Parker*, in *High Street, Oxford*, was a most respectable print-seller, and that on the morning after the arrival of the package at the defendant's office there, his porter called on Mr. *Parker*, and asked him whether he expected any parcel from *London*, to which he answered that he did not. It also appeared, that it was the course of the defendant's office, to deliver parcels at *Oxford*, at the places to which they were directed.

For the defendant, his book-keeper in *London* proved that the following notice was put up in a conspicuous part of the office, and immediately opposite the entrance door, *viz.* "Take notice, that the proprietors of the public carriages who transact their business at this office, will not be answerable for any packages containing cash, bank-notes, bills, jewels, plate, or watches, however small the value may be, or for any package of more than five pounds value, if lost or damaged, unless the same is specified when delivered into the office." The defendant's book-keeper at *Oxford* proved, that on the morning after the arrival of the parcel in question, and during the absence of the porter, a person came to the office and enquired for the parcel, and said that he had seen Mr. *Parker* in the early part of the morning, and that he had before received two parcels which were directed for Mr.

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Thursday, Jan. 24.

A carrier is bound to deliver a parcel at the place to which it is directed. Where therefore, a parcel of goods was directed to "Mr. *James Parker, High Street, Oxford,*" who, on being applied to, said that he expected no such parcel, and it was afterwards delivered to a person who called at the defendant's office, claiming it as his, and who paid the carriage for it:—Held, that it was properly left to the Jury, whether, under the circumstances, the carrier had been guilty of gross negligence; and they having found that he had, the Court refused to grant a new trial, which was moved for, on the grounds, first, that the plaintiffs had corresponded by letters, with the defendant, after the loss, requesting him to apprehend the person to whom the parcel had been delivered, as a swindler; secondly, that intimation of the value of the parcel was not given to the defendant at the time it was delivered at his office, according to a notice which was there affixed, limiting his responsibility to 5*l.* except the value of the parcel was specified when delivered; and lastly, that the property in the goods contained therein, had passed from the plaintiffs to the consignee.

THIS was an action on the case, brought against the defendant as a common carrier, for negligence in the conveyance of a parcel from *London* to *Oxford*. The first count of the declaration stated that the plaintiffs had caused a package of goods to be delivered to the defendant to be carried by him from *London* to *Oxford*, and there, pursuant to an address subscribed thereon, (to wit), "Mr. *James Parker, High Street, Oxford,*" to be safely delivered, for certain reward to be therefore paid by the plaintiffs to the defendant in respect thereof; and assigned for breach that he did not safely convey or deliver the package at *Oxford* pursuant to such address. The second count stated that the plaintiffs had delivered a package to the defendant, directed to "*J. Parker, Oxford,*" to be safely carried and delivered by him there, but that through the negligence and carelessness of the defendant, it was lost. The third count stated, that the plaintiffs had caused a certain package of goods to be delivered to the defendant, to be safely and securely carried by him from *London* to *Oxford*, and that by the negligence and default of him and his servants, it became wholly lost to the plaintiffs. The defendant pleaded the General Issue.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last Term, the plaintiffs proved that a stranger called at their warehouse in the city, and requested them to send some silks and other articles to Mr. *James Parker*, of *High Street, Oxford*; that they were accordingly packed up; but as the plaintiffs had never

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of the evidence to them, from the time of the delivery of the parcel at the defendant's office in *London*, to its being claimed and given up to the person calling for it at *Oxford*; but he did not direct their attention to the letters of the plaintiffs, in the former of which they desired the defendant to apprehend the person who had obtained the parcel as a swindler, nor did he advert to the conversation between one of the plaintiffs and the book-keeper at *Oxford*, but observed, that if the defendant or his servants had not taken the same care of the parcel as a prudent man would have taken of his own, he had been guilty of gross negligence; and the Jury accordingly found a verdict for the plaintiffs.

Mr. Serjt. *Pell* now moved for a rule to shew cause why such verdict should not be set aside, and a new trial granted; and submitted, in the first place, that the whole of the evidence had not been stated to the Jury; that the effect of the first letter written by the plaintiffs to the defendant was most material, as they therein wished him to cause the person who had taken the parcel to be apprehended as a swindler, from which it is quite clear, that they did not consider that the defendant had been guilty of any negligence, or that he was responsible to them for the loss. They desired the defendant to assist in finding out the man who had been guilty of the imposition, without even intimating that they considered the defendant as liable; and they thereby completely altered the rights of the parties, and waived any claim they might have had to recover as against him in his character of carrier. Besides, if they had considered the defendant liable in the first instance, he might have apprehended the person on his own account. Secondly, the terms of the notice should have been pointed out to the Jury and their attention directed to it, for even if it had not been seen by the plaintiffs porter, as he must be taken to have had a full knowledge of the value of the contents of the package, he should have informed the book-keeper of it at the time; for there is a manifest distinction to be made with respect to a

parcel of a great or small value; and it is the duty of every person on delivering a parcel to a carrier, to acquaint him with its value, in order that proper care may be taken of it; for the same degree of attention would not be required to be paid to a parcel of *5l.* value as to one of *100l.* and therefore the negligence of the defendant in this case, if any, has been completely waived by the plaintiffs not having caused the value of the parcel to be made known to him at the time it was left at his office in *London*. In *Batson* v. *Donovan*, Mr. Justice *Bayley* said (*a*), "There was no misfeasance in the defendants or any of their servants. I left, I believe, these two questions to the Jury. First, whether the plaintiffs dealt fairly by the defendants, in not apprising them that the box contained articles of value; and secondly, whether, in the case of a parcel of such value as the defendants might fairly expect this to be, there was gross negligence in the defendants." From that it must be inferred, that the terms on which goods are to be accepted by a carrier to be conveyed, must be made known to him at the time, as well as the value of the article to be carried; and here the defendant was fully justified in supposing that the value of the package did not amount to *5l.* as it was not specified that it exceeded that sum, when it was delivered into the office. Thirdly, this action cannot be maintained by the plaintiffs for the loss, as when the parcel was delivered at the defendant's office, it became the property of the consignee, *Dawes* v. *Peck* (*b*), and the defendant had every reason to believe that the person who called for and claimed it, was entitled to receive it.

Lord Chief Justice DALLAS.—I certainly stated at the trial, that this case embraced a question of considerable importance, and I still think so, but not on the grounds that have been now taken by my Brother *Pell*. At the conclusion of the cause, I, as well as a most respectable Special Jury, felt no hesitation whatever as to the liability of the defendant.

(*a*) 4 Barn. & Ald. 35.——(*b*) 8 Term Rep. 330.

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Still, however, I agree that the case is not only important as relating to the rights of carriers, but is equally so with respect to their obligations, as well as to the protection which ought to be afforded to the public. What then are the facts? A stranger called on the plaintiffs at their warehouse in *London*, and ordered goods, consisting of silks and other articles, to be sent to a person at *Oxford*, who was wholly unknown to them, and to be directed to him in the *High Street* there, by the name of *James Parker*. Having been informed of his residence, the plaintiffs enquired as to the character and responsibility of *Parker*, and was referred by the person who ordered the goods, to a Mr. *Holt*, who stated that *Parker*, in the *High Street*, *Oxford*, was a most respectable tradesman. They therefore, on his representation, sent the parcel to the defendant's office, directed to "Mr. *James Parker*, *High Street*, *Oxford*." It is quite clear, that they intended to give credit to him alone, for the parcel was addressed specifically to him by name and residence. The parcel was consequently forwarded to *Oxford* by the defendant's waggon, and it was his duty as a carrier, on its arrival there, to have taken care that it was duly delivered as directed; *viz.* to "Mr. *Parker*, in the *High Street*," as it was proved at the trial, that the course of delivery invariably adopted by the defendant was, to deliver parcels at the respective houses to which they were directed. It further appeared, that *Parker* of the *High Street*, had before been in the habit of receiving parcels sent by the defendant's waggon. Besides, the porter at *Oxford* knew the course adopted at the defendant's office, and that it was his duty as his servant, to deliver the parcel in question where it was directed, but he having to deliver another parcel opposite Mr. *Parker's* house on the morning in question, he saw Mr. *P.* and told him there was a parcel for him at the office, which he would deliver shortly, to which Mr. *Parker* replied that he expected none, and that he knew nothing about it.—On these facts, I stated to the Jury that the duties of a carrier might vary according to circumstances;

that if a parcel be directed to a person by name, at his residence, or to be left at the office till called for, it will make a material difference. In *Birkett* v. *Willan* (*a*), it appeared that the plaintiffs packed up a parcel of goods, and directed it to "*J. Worthy, Exeter,*" and on the arrival of the parcel there, the book-keeper delivered it to a stranger on payment of the carriage; and it was held, that the defendants, who were the proprietors of the coach by which the parcel was sent, were liable for gross negligence, although the contents of the parcel were above the value mentioned in their public notice, and although it had not been specially entered and insured; and Mr. Justice *Abbott*, before whom the cause was tried, stated to the Jury (*b*), that "if a parcel was directed to a person generally, in such a place as *Exeter*, without specifying his place of abode, the carrier was not bound to carry that parcel to any place, but he would fully discharge his duty by delivering it at his office, to any person coming from the person to whom it was so directed, or whom he might reasonably suppose to come from that person; and he left it to the Jury to say, whether, under the circumstances proved, the defendant had reasonable ground for thinking that the man to whom he delivered the parcel, came from the person to whom it was directed;" and on a motion for a new trial, after that learned Judge had been appointed Chief Justice, his Lordship was inclined to think that the defendants had been guilty of gross negligence, so as to throw the *onus* of responsibility on them as carriers. Here, however, the parcel was directed to be delivered to a particular person at a particular place; and I therefore told the Jury that this case was distinguishable from that of *Birkett* v. *Willan*, as it was not directed to a person generally, or to be left at the office till called for, and therefore that they had only to consider whether it was not the duty of the defendant to have caused the parcel to be delivered where it was directed, and whether he had not been guilty of gross

(*a*) 2 Barn. & Ald. 356.——(*b*) Id. 358.

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negligence in not having so done. In *Bodenham* v. *Bennett* (*a*), where a carrier, by his servant, had carried a parcel beyond the place of its destination and it was lost, the Court of Exchequer held such carrier to be responsible, and not protected by the terms of the notice, upon the principle that at the time the loss accrued, the carrier was not carrying the parcel to its place of destination, but by a wrongful act of his own, had divested himself of the charge of it on its way there; and Mr. Baron *Wood* there said, "that a carrier is bound, not only safely to convey, but safely to deliver a parcel at the place to which it is directed, according to the terms of his contract." Here, after the defendant's porter at *Oxford* had seen that the parcel was directed to "Mr. *Parker*, in the *High Street*," and told him on the morning after its arrival that it was at the office, to which Mr. *Parker* returned for answer that he expected no parcel, and knew nothing about it; he should have apprised the book-keeper of the circumstance immediately on his return to the office, that Mr. *Parker* had disclaimed all knowledge of the parcel. It appeared however, that it was afterwards delivered to a person calling himself *Parker*, whose residence was unknown to the defendant's servants, and who had received two small parcels before, which had been directed generally for "Mr. *Parker*, *Oxford*, to be left at the defendant's office till called for." Should not therefore the person who delivered the package in question, have at least enquired what authority the person claiming it had to receive it? I said at the trial, that if this were not negligence, there would be an end of carriage for hire, for who would be safe, if a carrier might deliver a parcel to a person of whom he is altogether ignorant, and whose residence is unknown to him, when he must have well known the person to whom it was directed, not only by name, but by residence, and who had informed the porter in the morning that he did not expect any parcel? He should at all events have been satisfied whether it was

(*a*) 4 Price, 31.

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to be delivered to Mr. *Parker* in the *High Street* or not; before he gave it to a third person. I therefore thought this a case of gross negligence, but I did not leave the question as to what should be deemed gross negligence alone to the Jury, for I explained to them what I considered such negligence to be; and concluded by stating, in the terms of my Brother *Best*, in the case of *Batson* v. *Donovan*, that it was the duty of the defendant and his servants to take the same care of property committed to his charge, that a prudent man would take of his own (*a*). The Jury were clearly of opinion, on my so leaving the case to them, that the defendant had been guilty of gross negligence. I did not think it necessary to detail to them every *minutiæ* of evidence with respect to the notice, or the circumstances that had transpired after the loss, and no complaint as to my having omitted any thing material, was made at the trial. And as it appears to me that a case of gross negligence was fully proved, it suspended the necessity of considering those points which have been now raised, and I therefore think that the verdict was not only proper, but that there is no reason whatever to disturb it.

Mr. Justice PARK.—The chief ground of this application is, that although my Lord Chief Justice stated the main facts to the Jury at the trial, yet that he did not distinctly point out to them the circumstances which transpired subsequently to the delivery of the parcel, and which were disclosed by the letters of the plaintiffs, and a conversation by one of them at the defendant's office at *Oxford*, but I do not think that this was necessary, for the only question was, whether the defendant or his servants had been guilty of gross negligence in the delivery of the parcel. The objection which has been now raised, as to the plaintiffs not being entitled to recover in this action, on the ground that the property in the goods had passed to the consignee, was not

(*a*) See 4 Barn. & Ald. 30.

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taken at the trial, nor does it appear to apply to the present case, which is bottomed in fraud, and in which there has been no sale. On the whole, therefore, I am clearly of opinion that the case was most properly left to the Jury, and that they were perfectly warranted in finding that the defendant had been guilty of gross negligence, for it would be too much to say, that if a parcel be directed to a particular person at his known residence, a carrier might deliver it to any person who might think proper to call at his office for it.

Mr. Justice BURROUGH.—In the case of *Forward* v. *Pittard* (*a*), it was determined, that a carrier who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or destroyed by the act of God or the King's enemies;—even though the Jury have expressly found that the goods were destroyed without any actual negligence in the carrier. Since that decision, carriers have been continually endeavouring to narrow their responsibility and avoid their duties, which I think ought not to be favored by law. At all events, a carrier has been always considered liable in a case of gross negligence, and the only question here is, whether, under the circumstances as disclosed at the trial, the defendant has been guilty of such negligence or not. I not only think that he has, but that the case was most properly left to the Jury by my Lord Chief Justice, for it was unnecessary for him to go through the whole of the evidence; it was sufficient to detail to them the facts with respect to the loss of the parcel, and explain what the law would consider a case of gross negligence.

Mr. Justice RICHARDSON.—I am perfectly satisfied both as to the law and facts of this case. The action was most properly brought by the plaintiffs, as they had a property in the goods, of which they had been deprived by a gross

(*a*) 1 Term Rep. 27.

fraud. I also think that the defendant has been guilty of gross negligence, as the parcel was not delivered as directed. All the material facts relative to its loss were before the Jury, and his Lordship did not tell them that the defendant was liable in the first instance, but fully explained to them what he considered a case of gross negligence to be; nor does it appear to me that the letters written by the plaintiffs, or the subsequent conversation by one of them, amount to a waiver of their right to recover the value of the parcel from the defendant. Another point has been raised by my Brother *Pell* as to whether it was not necessary to give information of the value of the parcel on its delivery at the defendant's office in *London*. Such notice may be material or not, according to the circumstances of each particular case; and in *Batson* v. *Donovan*, a small parcel contained bank notes and bills of exchange to the amount of 407*l*. and nothing was said as to its contents, nor did the defendants know that it contained articles of such value at the time of its delivery to them. There too, it was directed to "*William Batson, Newcastle*," generally. In that case therefore, the concealment of the value was improper, for if the defendants had known the parcel contained bank-notes, they would have caused greater care to have been taken of it. Here, however, the parcel was of a considerable size, and not very valuable; and it was not directed generally, but to the specific place of residence of a particular person; and it appears to me, that in such a case, a carrier is bound to use due diligence, and deliver all parcels entrusted to his care, at the places where they are directed. This case, therefore, appears to me to be distinguishable from that of *Batson* v. *Donovan*, and I concur with the Court in thinking, not only that the verdict of the Jury was right, but that it ought not to be disturbed.

Rule refused (*a*).

(*a*) See *Garnett* v. *Willan*, 5 Barn. & Ald. 53. *Sleat* v. *Fagg*, Id. 342.

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Friday, Jan. 25.

DOE, on the Demise of YOUNGHUSBAND *v.* ROE.

The lessor of a plaintiff, who claims as heir at law, cannot compel a person to appear and plead to issue in an action of ejectment, without serving him with a copy of a declaration, although the premises were unoccupied, and a copy had been affixed on the outer door thereof.

MR. Serjt. *Hullock* moved, that a person by the name of *Colebank* might appear and plead to issue in this cause, on an affidavit which stated, that the present action was brought to recover possession of a messuage claimed by the lessor of the plaintiff, as heir at law, under the will of his father; that *Colebank* had stated, that he was in possession of and entitled to the premises; that no person having been found in the occupation thereof, a copy of the declaration had been affixed on the outer door, but that *Colebank* had afterwards crept in at a window, and put additional locks and fastenings on the doors.

But the Court said, that they could not compel him to appear; that the lessor of the plaintiff must take possession of the premises as heir at law, and serve *Colebank* with a copy of the declaration, and leave him to dispute the title of the former.

The learned Serjeant therefore took nothing by his motion.

Saturday, Jan. 26.

BOASE *v.* JACKSON.

The plaintiff demised a slate pit at *S.* and stone quarries at *M.* to the defendant under an indenture of lease, to hold the one from *Lady-day*, 1815, and the others from *Michaelmas*, 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate pit, and 130*l.* for the quarries:—Held, that all the premises might be demised by one indenture of lease, and that one *ad valorem* stamp on the aggregate amount, was sufficient under the 55 *Geo.* 3. *c.* 184, Sched. Part 1. tit. *Lease*, as the letting must be considered as one transaction, and there being no evidence of an intent by the parties to defraud the revenue.

THIS was an action of covenant for non-payment of rent.

At the trial of the cause, before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after the last Term, it appeared

that the defendant held a slate pit and stone quarries, in the county of *Leicester*, as tenant to the plaintiff. On the production of the lease, under which the former occupied, dated the 1st *November*, 1819, it appeared that the plaintiff demised to him a slate pit or slate quarry at *Swithland*, and also certain stone quarries situate on *Mountsorrell Hills* in the county of *Leicester*, to hold the said slate pit and stone quarries to the defendant, from the respective periods thereinafter mentioned;—*viz.* the slate pit situate at *Swithland*, from the 25th *March*, 1815, for fourteen years from thence next ensuing, and the stone quarries at *Mountsorrell Hills* from the 29th *September*, 1817, for a like term from thence next ensuing, yielding and paying in respect of the slate pit at *Swithland*, the yearly sum of 70*l.* and also yielding and paying in respect of the stone quarries at *Mountsorrell Hills*, the yearly sum of 130*l.* such yearly sums of 70*l.* and 130*l.* to be paid by even and equal quarterly payments. Then followed a general covenant by the defendant for the payment of the said sums of 70*l.* and 130*l.* at the days, and in the proportions as above limited and appointed. The lease was engrossed on three skins of parchment, on the first of which was impressed an *ad valorem* stamp of 3*l.* and on the second and third a further progressive duty of 1*l.* on each, which would have been sufficient if the lease was to be considered as one instrument; when it was objected for the defendant, that as it contained two distinct demises and two *reddendums* of different properties, commencing and concluding at different periods, they must be considered as separate demises, and therefore could not be embraced in the same instrument; and further, that by the 55 *Geo.* 3. *c.* 184, Sched. Part I. tit. *Lease* (*a*), two different

(*a*) By which a lease or tack of any lands, hereditaments, or heritable subjects, at a yearly rent, without any sum of money by way of fine, premium, or grassum, paid for the same, where the yearly rent shall not amount to 20*l.* a duty of 1*l.* is imposed; and where the same shall amount to 20*l.* and not to 100*l.*, 1*l.* 10*s.*; and where it shall amount to 100*l.* and not to 200*l.* a stamp of 2*l.* is required; and a proportional *ad*

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stamps were required, *viz.* a stamp of 1*l.* 10*s.* on the first skin, being the *ad valorem* duty on the rent of 70*l.* *per annum* on the slate pit, and another *ad valorem* duty of 2*l.* being the like duty on the stone quarries, at the annual value of 130*l.* His Lordship however thought that the instrument was properly stamped, and the Jury accordingly found a verdict for the plaintiff. Leave, however, was given the defendant to move to set it aside in case the Court should be of a different opinion.

Mr. Serjt. *Vaughan* now moved for a rule *nisi*, that this verdict might be set aside and a nonsuit entered on the above objection, and observed, that it would operate to the prejudice of the revenue, if the instrument in question should be deemed to be properly stamped with a stamp of 3*l.* only on the first skin.

Lord Chief Justice DALLAS.—The only objection raised at the trial was, that there had been two distinct and separate demises incorporated in one indenture of lease, and therefore that it required two stamps on the first skin. It appeared that the defendant was let into possession of the slate pit at *Lady-day*, 1815, but that the stone quarries had been previously let to another tenant, whose term would not expire till *Michaelmas*, 1817, until which time, possession could not be given to the defendant. It therefore appears to me, that this may be considered as one letting and one entire bargain, although the property demised was of two different descriptions, the one consisting of slate and the other of stone, and consequently that they might be demised by one indenture of lease, and that the stamp of 3*l.* affixed to the first skin was sufficient as required by the 55 *Geo.* 3. *c.* 184, Sched. Part I. tit.

valorem duty from the sum of 200*l.* to the sum of 1000*l.* or upwards; and where any such instrument should contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,030 words, a further progressive duty of 1*l.* was imposed.

Lease, and more particularly so, as there was no ground for supposing at the trial, that the parties had any idea of defrauding the revenue by using an improper stamp.

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The rest of the Court concurring,

Rule refused.

COCKELL and Another *v.* GRAY and WARREN.

Saturday, Jan. 26.

Where the defendants became sureties in a composition deed, by which the debtors covenanted to pay their creditors by certain instalments, within sixteen months from the date thereof, *viz.* two shillings in the pound within four calendar months, a like sum within eight calendar months, a like sum within twelve calendar months, and the fourth or last instalment within sixteen calendar months; and on the record it was stated, that the creditors were to receive their four respective instalments on or before the expiration of sixteen *calendar* months from the date thereof, but the instalments were alleged to be payable within four, eight, twelve, and sixteen months generally, omitting the word "calendar:"—Held, that this was no variance, as the deed clearly shewed, that the parties meant calendar months. Where a deed purported to bear date on the 20th *November*, and was executed by one of two defendants on the 16th of that month, and by the other on a previous day:—Held to be immaterial, it not appearing that a blank was left for the date at the time of the execution.

THIS was an action of covenant, brought by the plaintiffs to recover a sum of money due to them from the defendants, under a deed of composition, made by persons of the name of *Mercer*, of the first part, certain trustees therein named of the second, the defendants of the third, and the joint creditors of the *Mercers* (of whom the plaintiffs were two), of the fourth part; by which the defendants covenanted to secure the payment of 7*s.* 6*d.* in the pound, for debts due from *Mercers* to their creditors, by certain instalments therein mentioned. The deed was stated in the declaration to bear date on the 20th *November*, 1819, and the instalments to be payable within four, eight, twelve, and sixteen months from the date thereof; but in a former part of the declaration it was alleged, that the creditors were to receive their four respective instalments on or before the expiration of sixteen *calendar* months from the date of the deed. Plea, *non est factum*. On the production of the deed at the trial, before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last Term, the subscribing witness

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proved, that it was executed by the defendant *Warren* on the 16th, and not on the 20th *November*, 1819, and that *Gray* executed it on a previous day in that month, but on which particular day the witness could not recollect. It also appeared by the terms of the deed, that the instalments were to be paid within sixteen months, to be computed from the date thereof, *viz.* the first instalment of two shillings in the pound, within the space of four calendar months; the second, of two shillings in the pound, within eight calendar months; the third, of two shillings in the pound, within twelve calendar months; and the fourth or last instalment, of one shilling and six pence in the pound, within the space of sixteen calendar months.

For the defendants it was objected, that the plaintiffs could not recover, first, as the deed did not appear to have been executed by the defendants on the day on which it purported to bear date, and secondly, that the instalments were stated in the record to be payable within four, eight, twelve, and sixteen months generally, without specifying that they were calendar months, as stated in the deed. His Lordship, however, over-ruled both these objections, and the Jury found a verdict for the plaintiffs. Leave, however, was given the defendants, to move to set it aside, if the Court should be of opinion that they were well founded in point of law.

Mr. Serjt. *Pell* now moved for a rule *nisi*, that this verdict might be set aside and a nonsuit entered. With respect to the first objection, he observed, that as the instalments were to be paid within certain stated periods from the date of the deed, such date was most material to be attended to, as the payment of those sums could only be effected by having recourse to the express terms of the instrument itself. Besides, it did not appear to have been filled up at the time it was executed by *Warren*, as a blank was left for the date. If therefore it was filled up afterwards, without his knowledge or assent, it would be a material alteration.

[Lord Chief Justice *Dallas*.—That point was not made at the trial. It was proved by a solicitor, that *Warren* executed the deed on the 16th *November*, as he saw him sign his name on that day, but it was dated on the 20th of that month.] Secondly, there was a material variance between the statement in the record and the deed produced at the trial, as to the times of the payment of the instalments; for in the former they were expressed to be made payable within four, eight, twelve, and sixteen months, and in the latter they were expressly stated to be payable within such respective calendar months, and in the general acceptation of law, the word "month" must be considered to mean a *lunar* month, and the omission of "*calendar*," in the record, constituted a fatal variance. The deed in question was not in the nature of a commercial instrument, and even if it were, the term "month" must be considered as a lunar month, for in *Jocelyn* v. *Hawkins* (*a*), which was a case of a contract to deliver stock one month after it was made, and a tender was made according to the calendar month, it was ruled, that it must be a lunar month, although many witnesses were called to prove that the course of *Change Alley* was to reckon according to calendar months. So, in *Lacon* v. *Hooper* (*b*), it was held, that when the word *month* is used in a statute, it is understood to mean a *lunar* month, unless a contrary sense be expressed or implied. He also submitted, that there was another variance between the deed and record, as the former purported to be executed on various considerations, and in the latter it was stated to have been executed for the consideration therein mentioned; but this latter objection the Court instantly over-ruled.

Lord Chief Justice DALLAS.—The mode of computing the term "month," depends on the intention of the contracting parties. In bills of exchange and other commercial instruments, it is considered as a calendar month. In *Pugh*

(*a*) 1 Stra. 446.——(*b*) 6 Term Rep. 224.

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v. *The Duke of Leeds* (*a*), it was held, that the word "*from*" might be reckoned inclusively or exclusively, according to the context and subject-matter. Here, there can be no doubt but that the parties intended calendar months, and as it does not appear from my notes, that a blank was left for the date at the time *Warren* executed the deed, I am of opinion, that there is no weight in either of the objections now raised, to set aside the verdict found for the plaintiffs. Besides, the attesting witness swore that the defendant *Warren* executed the deed on the 16th *November*, 1819, and that it had been then already executed by the other defendant.

Mr. Justice PARK.—In statutes and criminal cases, the word "month," is generally reckoned to be a lunar month. In passing a sentence of imprisonment therefore, the word "calendar" is generally expressed and prefixed to it; but in commercial instruments, as in bills of exchange or policies of assurance for time, calendar months are always intended. If the date of the deed in question was not inserted when it was executed by the defendant *Warren*, or several blanks were left, it might be material, if the instrument were only to operate from the day of its date. It does not appear, however, that there was any evidence of that fact at the trial.

Mr. Justice BURROUGH.—In *Lang* v. *Gale* (*b*), it was determined, that the word "month" may mean lunar or calendar month, according to the intention of the contracting parties; and Mr. Justice *Le Blanc* there said (*c*), that "in matters of contract, the question will ever be, what was the intention of the contracting parties, at the time when they made use of the word 'month.' Looking at this case, I think the parties clearly had in their contemplation calendar, and not lunar months."—So here, the intent must be collected from a reference to the instrument, from which it

(*a*) Cowp. 714.——(*b*) 1 Maul. & Selw. 111.——(*c*) Id. 117.

will appear, that no doubt whatever can be entertained but that the parties intended calendar months. With respect to the objection as to the day of the date, and the time of the execution of the deed, the date uniformly relates to the day inserted in the body of the instrument. If it were held otherwise, it would upset the usual transactions of life. Even if the date had not been filled up in the deed in question when it was executed by the defendant *Warren*, I do not think it would have been so material as to have the effect of vitiating the instrument as against both the defendants.

Mr. Justice RICHARDSON.—If a mortgage deed be dated on the 1st *January*, and the mortgagor covenant to pay within six months from the date thereof, and it turn out that the deed was executed on the 2d of that month, can it be contended, that that would avoid the instrument? In all mercantile contracts where the word "month" is used, it is intended to mean a calendar month, as in bills of exchange, policies of assurance, or in charter-parties, where freight is to be paid within a certain number of months after the sailing of the vessel. As to the first objection, the fact that the date of the deed was not filled up at the time it was executed by *Warren*, did not appear at the trial. With respect to the second, there can be no doubt whatever as to the intention of the parties, which may be clearly collected from the terms of the instrument itself.

Rule refused (*a*).

(*a*) In *Texira* v. *Evans*, 1 Anstr. 229, n. it was determined, that a deed made with blanks, and afterwards filled up and delivered by the agent of the party, was good; and in Archbold on Pleading, page 99, it is stated, "that if a deed have no date, it should be pleaded of the day it was delivered, or if dated, it may be pleaded as having been made either on the day it bears date, or on the day it was delivered, at the option of the party pleading it." See also Comyn's Digest, tit. *Fait*. B. 3. With respect to the meaning of the term "month," and how it is to be computed, see *The Bishop of Peterborough* v. *Catesby*, Cro. Jac. 166. *Barksdale* v. *Morgan*, 4 Mod. 185. *The King* v. *Adderley*, 2 Doug. 463. *The King* v. *Peckham*, Carth. 406, and *Titus* v. *Preston*, 1 Stra. 652.

1822.

Saturday, Jan. 26.

GODFREY, an Infant, (suing by DAY, his next Friend) *v.* WADE.

Where a parol submission was made by an infant plaintiff to a reference, before trial, and an arbitrator made an award in favor of the defendant. On the plaintiff's refusing to comply with the terms of such award, the defendant may proceed to trial by proviso.

MR. Serjt. *Bosanquet* moved for judgment as in case of a nonsuit, on an affidavit which stated, that this cause was set down for trial at the last Assizes at *Buckingham*; that the defendant's briefs were prepared and delivered to counsel, when a reference was proposed on the part of the plaintiff, and acceded to by the defendant; that the submission was by parol; that the record had been withdrawn, and an award made in favor of the defendant, and that the arbitrator had directed the plaintiff to pay all costs; that the payment of those costs had been duly demanded from the plaintiff and refused.

The learned Serjeant suggested, that as the submission had been merely by parol, the defendant had no remedy to enforce the performance of the award by attachment, as it could not be made a rule of Court; and that as the plaintiff was under age at the time of the submission, the defendant was also deprived of any remedy that he might have against him.

But the Court held, that notice should be given the plaintiff that the award had been made, and that he should be asked whether he would abide by it or not; and that if he refused to do so, the defendant might carry down the record, and proceed to trial by proviso.

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GARDNER, Assignee of JARMAN, a Bankrupt, *v.* SLACK.

Saturday, Jan. 26.

Where a defendant in an action brought against him by the assignee of a bankrupt, pleaded the general issue, without giving notice of his intention to dispute the bankruptcy, he may, under a Judge's order, have leave to withdraw such plea, and plead it *de novo*, with the notice required by the 49 *G.* 3. *c.* 121. *s.* 10.

MR. Serjt. *Pell* moved that an order made by Mr. Justice *Park* on the 22d instant, by which the defendant was permitted to withdraw his plea of *non assumpsit* and plead it *de novo*, with a notice of his intention to dispute the bankruptcy of *Jarman*, might be rescinded; on an affidavit which stated, that the defendant had pleaded the general issue only, without having given the plaintiff notice of such intention.

The learned Serjeant contended, that as by the statute 49 *Geo.* 3. *c.* 121. *s.* 10, it was enacted, that "in actions to be brought by or against an assignee of a bankrupt, the commission and the proceedings under it should be evidence to be received of the petitioning creditor's debt, &c. unless the party, if defendant, should *at or before the time of his pleading* to such action, give a notice in writing to such assignee, that he intended to dispute such matters,"—the defendant must abide by his former plea, and cannot afterwards be allowed to withdraw and plead it *de novo*, with the notice required by that statute.

Mr. Justice PARK.—Before I granted this order, I enquired if the plaintiff would be thereby deprived of his remedy of going to trial in this Term, and was informed that he would not, on which I thought the defendant was entitled to withdraw his plea, on principle. Shortly after I took my seat in this Court, an application was made to me at Chambers, on behalf of a defendant, against whom an action for an involuntary trespass had been brought, and who had pleaded not guilty; that such plea might be withdrawn, and a tender of sufficient amends made, under the statute 21 *Jac.* 1. *c.* 16, *s.* 5. I thought that the tender should have been made before the action was commenced, and refused the application; but the Court, on motion, afterwards held, that he

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was entitled so to do. I therefore made an order in this case, giving the defendant leave to withdraw his plea and plead it *de novo*, on payment of costs, with the notice required by the act.

The rest of the Court concurring,

The learned Serjeant took nothing by his motion (*a*).

(*a*) See 1 Tidd, 7th edit. 696, 7.

Tuesday, Jan. 29.

HORSTON *v.* SHILLITER.

In an action for a breach of promise of marriage, the declaration contained three counts, the first to marry on request, the second within a reasonable time, and the third generally. On a motion to amend the declaration, by inserting a new count to marry on a particular day, the Court ordered the first count to be amended, by striking out the promise to marry on request, and introducing a particular day therein, although the declaration had been filed more than two Terms before the application was made, and directed the costs of such application to abide the event of the cause.

THIS was an action of *assumpsit* for a breach of promise of marriage. The writ was returnable in *Easter* Term last, and the declaration was filed as of that Term, and contained three counts: the first of which stated a promise by the defendant to marry the plaintiff on request: the second, a like promise within a reasonable time; and the third, to marry generally.

Mr. Serjt. *Vaughan*, on a former day in this Term, obtained a rule *nisi*, that the declaration might be amended, by adding a new count, containing a promise by the defendant to marry the plaintiff on a particular day.

Mr. Serjt. *Blosset* now shewed cause, and submitted, that although the course of this Court formerly was, that the plaintiff might, at any time before the end of the second Term, have leave to amend his declaration, by adding new counts, but not afterwards; yet at present, it is not an invariable rule, that a new count shall not be added after the second Term. The principle of the rule is, that as the plain-

tiff would have been out of Court at the end of the second Term, if he had not declared at all, so the Court will not suffer him to declare upon a fresh cause of action, after that time has elapsed; but where the cause of action is substantially the same, a new count may be added (*a*). But here, by the insertion of a count alleging a promise by the defendant to marry the plaintiff on a particular day, a new cause of action will be introduced.

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The Court observed, that it was in their discretion to grant the amendment as prayed for: and they ordered the first count to be amended by striking out the promise to marry on request, and inserting a like promise on a particular day, and directed the costs of the application to abide the event of the cause; and on these terms the rule was made

Absolute (*b*).

(*a*) See 2 Tidd, 7th edit. 730.——(*b*) See *Seymour* v. *Gartside*, 2 Dow. & Ryl. 55.

MENCE *v.* HAMMOND.

Tuesday, Jan. 29.

Where upon the grant of an annuity, the agent of the grantees, on paying the consideration money, retained a considerable sum for the expences of

MR. Serjt. *Hullock*, in the course of the last Term, had obtained a rule *nisi*, that the proceedings in this action might be stayed, and the annuity deeds on which it was founded delivered up to be cancelled, and that the judgment signed on the warrants of attorney which were given to secure the annuity, might be vacated, and that execution on the judg-

preparing the deeds, and a further sum by way of advance to answer the first year's payment of the annuity, the Court set aside the deeds against a person who was surety for the payment of the annuity by two collegians, who were minors at *Cambridge*;—on the ground, that this was an illegal retainer, but they imposed on such trustee the terms of returning the principal with interest, on taking an account before the Prothonotary.

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ment might in the mean time be stayed. He founded his motion on an affidavit of the defendant, which stated, that two students at *Cambridge*, who were minors, applied to him in *May*, 1818, to raise 1500*l.* for them by way of annuity; that he in consequence applied to an attorney there, who said he could obtain that sum, on the defendant's becoming trustee for them, and paying an annuity of 250*l.* for his life, and the lives of the grantors; that at the time of the execution of the deeds, there appeared to be two grantees, in which it was expressed, that one of them had advanced 900*l.* as part of the consideration money, and the other 600*l.*, and that two warrants of attorney were given to secure the payment of those sums, but that neither the defendant nor the grantors received the sum of 1500*l.* but 981*l.* only, as the agent to the grantees retained 245*l.* as the expences of the *London* agents in preparing and enrolling the deeds; 24*l.* for the fees and expences of the solicitor at *Cambridge*; and the two several sums of 150*l.* and 100*l.* by way of advance, to answer the first year's payment of the annuity.

The learned Serjeant submitted, that under these circumstances, the Court would order the proceedings to be stayed, and the annuity deeds cancelled, as they had a summary jurisdiction given them so to do, by the statute 53 *Geo.* 3. *c.* 141. *s.* 6 (*a*).

(*a*) By which it is enacted, "that if the consideration, or any part of it, shall be returned to the grantee, or any of the notes in which it is paid be cancelled, or if it be expressed to be paid in money, but be paid in goods, or if any part be retained on pretence of answering the future payments of the annuity, or any other pretence, it shall be lawful for the person by whom the annuity is made payable, or whose property is liable to be charged or affected thereby, to apply to the Court in which any action shall be brought for the payment of the annuity or judgment entered, by motion to stay proceedings in the action or judgment; and if it shall appear to the Court, that such practices as aforesaid, or any of them have been used, it shall and may be lawful for the Court to order every such deed, &c. to be cancelled, and the judgment, if any has been entered, to be vacated."

Mr. Serjt. *Vaughan* and Mr. Serjt. *Onslow* now shewed cause on affidavits which stated, that although the sum of 1500*l.* was not paid to the defendant nor the grantors, on the execution of the deeds, still, that it was not retained, and that the only sum deducted was the amount of the expences incurred in preparing and enrolling them, but it was not denied that 250*l.* was retained to answer the purpose of defraying the first year's payment of the annuity. It also appeared, that the plaintiff was the agent of the grantees; that an action for non-payment of the annuity had been commenced by him against the defendant, and to which he had pleaded before the present application was made to the Court. It was therefore submitted, that if there was any doubt as to whether any part of the consideration money was improperly retained at the time the annuity was granted, it would appear at the trial, and that the Court could not interfere in a summary way.

Mr. Serjt. *Hullock*, in support of the rule, contended that the defendant's affidavit had received no answer whatever by those for the plaintiff, and that although the former had acquiesced in the payment of the annuity for several years, still, that there could be no question but that the sums sworn to by the defendant were either returned to or retained by the grantees, at the time the deeds and securities were executed.

Lord Chief Justice DALLAS.—The statute 53 *Geo.* 3. was passed for the better protection of infants who might require advances to be made to them in cases of difficulty and necessity, and who might otherwise be compelled to accede to any terms, however unreasonable; and must therefore receive a beneficial construction. In cases of this description, it is the duty of the Court to see whether the facts as stated in support of the complaint, be fully answered or not. Here it has been sworn, that a consider-

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able part of the consideration money was retained at the time the deeds were executed. That part of the charge therefore, should have been fully and substantially negatived. The only question then is, whether any part of the consideration money was withheld from the grantors by the agents of the grantees, at the time it was granted? It appears that the former were two students at *Cambridge*, and not of age, and for whom the defendant acted as trustee, for the due payment of the annuity. Here, I cannot refrain from observing, that I consider if an attorney at either of our universities, knowing that students there are under age, uses his endeavours to raise money for them by way of annuity, he is thereby guilty of a misdemeanor. It is true, that in this case, the application was made to the defendant in the first instance, who was an adult; but in point of substance, the annuity was to be paid by two young and inexperienced collegians. It has not been denied, that the sums in question were not ultimately kept back from the defendant and the grantors, or that they did not receive the full consideration at the time the annuity was granted; it is merely sworn, that they were not retained, while, on the other hand, it is expressly sworn, that the sums of 150*l.* and 100*l.* were retained as an advance for the payment of the first year's annuity. That appears to me to fall within the provision of the statute, and I am therefore of opinion, that this rule must be made absolute.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—A summary jurisdiction is given to the Courts, in cases of this description, by the 53 *Geo.* 3. *c.* 141, which they are empowered to exercise according to their discretion, and here it appears, that the affidavit in support of the application has received no satisfactory answer whatever by those in contradiction to it, and

consequently I am of opinion, that the defendant is entitled to the relief prayed for.

Mr. Justice RICHARDSON was of the same opinion.

Mr. Serjt. *Vaughan* then moved, that the consideration money might be restored, as in *Crespigny* v. *Wittenoom* (*a*), and *Drake* v. *Rogers* (*b*), and that it might be repaid with interest, as in *Hindle* v. *O'Brien* (*c*), where the Court would not set aside a judgment and execution, but upon the terms of the defendant's paying the principal and legal interest. And there the application, as in the present instance, was made to the equitable jurisdiction of the Court, and the party applying must therefore do that which is equitable.

The Court imposed on the defendant the terms of his returning the principal sum advanced, and that it should be referred to the Prothonotary to compute the principal and legal interest due thereon to the grantees;—and subject to those terms the rule was made

Absolute (*d*).

(*a*) 4 Term Rep. 793. See *verbâ*, Mr. Justice *Grose*.——(*b*) Ante, vol. iv. 402.——(*c*) 1 Taunt. 413.——(*d*) See *Poole* v. *Cabanies*, 8 Term Rep. 328.

ELWORTHY *v.* COWELL, CRISPIN, and HOWELL.

Thursday, Jan. 31.

THIS was an action brought by the plaintiff, as assignee of the late sheriff of *Devon*, on a replevin bond entered into by the defendant *Cowell* as principal, and the two other defendants as his sureties. The declaration was in the usual form, and all the defendants demurred generally.

A defendant cannot withdraw a general demurrer and plead specially, unless a full and reasonable cause be shewn for his so doing. Therefore, where to a declaration on a replevin-bond, the principal and sureties demurred generally, and the former had confessed a judgment in the original action, the Court would not allow one of the sureties to withdraw his demurrer and plead *per fraudem*, unless fraud were expressly shewn.

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Mr. Serjt. *Pell*, in the last Term, having obtained a rule *nisi*, that the defendant *Crispin* might withdraw his demurrer, and plead a judgment *per fraudem* against *Cowell*, and that the demurrer might stand as to the two other defendants only; on an affidavit which stated, that *Cowell* pleaded *non tenuit* in the original action, and afterwards confessed a judgment, and that the person making the affidavit believed, that it was confessed and obtained against him by fraud and contrivance, and for the purpose of enabling the plaintiff to charge the defendants *Howell* and *Crispin* as sureties on the bond,

Mr. Serjt. *Onslow* now shewed cause on affidavits which stated, that *Cowell* settled the original action by giving a *cognovit*, without any fraudulent view or intention. It appeared that in *Trinity* Term, 1819, an application was made for *Cowell* to withdraw the demurrer in this action, and plead *nul tiel* record, which was discharged.

The Court were of opinion, that there were no grounds whatever for the application. That at all events it should have been made earlier, and that a defendant cannot withdraw a demurrer for the purpose of pleading specially, without a full and reasonable cause be shewn for so doing.

Rule discharged, with costs (*a*).

(*a*) See 1 Tidd, 7th edit. 700.

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HOOKHAM *v.* MONCKTON.

Thursday, Jan. 31.

Where the plaintiff assigned certain debts owing to him to a trustee, in trust for a third person, one of which was owing from the defendant, and under which he was arrested, and whilst he was in custody of the sheriff, the plaintiff gave the latter notice that he had assigned the debt due from the defendant to him, and afterwards authorized the sheriff to discharge the defendant out of custody, the debt and costs being satisfied, and the trustee afterwards produced the assignment from the plaintiff to him, at the sheriff's office, and ordered the sheriff not to discharge the defendant, but he did so, and on being ruled to return the writ, returned, that he took the defendant, and safely kept him in custody, until the plaintiff discharged him, whereupon he permitted him to go at large:—Held, that the sheriff could not afterwards be ruled to bring in the body of the defendant, as the plaintiff might have his remedy, if any, by an action for an escape, and that the party to whom the debt was assigned, should have indemnified the sheriff for keeping the defendant in custody, at the time he gave him notice of the assignment.

MR. Serjt. *Vaughan*, in the last Term, obtained a rule *nisi*, that the sheriff of *Middlesex* might bring into Court the body of the defendant, to answer the plaintiff, agreeably to the writ of *capias ad respondendum* issued in this cause, on affidavits which stated, that the plaintiff, by indenture, dated on the 15th *March*, 1820, assigned to one *Partington*, in trust, certain sums then owing to the plaintiff by persons respectively named in a schedule subscribed thereto; that the defendant's name was inserted in the schedule as being indebted to the plaintiff in the sum of 130*l.*; that on the 23d *October*, 1821, the defendant was arrested by the sheriff of *Middlesex*, on a *capias ad respondendum*, and that whilst he was in custody, the plaintiff gave the sheriff notice in the presence of his officer, that he had assigned the debt due from the defendant to him to *Partington*, in trust for a third person; that on the 2d *November* following, the following order was addressed to the sheriff of *Middlesex*, by the plaintiff:—"*Hookham* v. *Monckton*. I hereby authorise you to discharge out of your custody the above-named defendant, I being satisfied as to the debt and costs of this action." This order was signed by the plaintiff, and his signature was attested by a subscribing witness; that *Partington* immediately afterwards sent to the sheriff's office, and produced the indenture of assignment from the plaintiff to him, and cautioned the clerk acting for the sheriff not to discharge the defendant, but that he nevertheless ordered the officer to discharge

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him out of custody, which was accordingly done; that the sheriff, on being ruled to return the writ under which the defendant was arrested, returned that he took him and safely kept his body, until the plaintiff discharged him (the sheriff) from further keeping him, wherefore he permitted him to go at large. The rule having been enlarged until this Term,

Mr. Serjt. *Lens* now shewed cause, and submitted that the sheriff could not now be ruled to bring in the body of the defendant, and that if the plaintiff had any remedy, it was by an action for an escape; that the sheriff was only bound to look at the parties to the record, and therefore, that the order given him by the plaintiff was a sufficient legal authority to warrant the discharge of the defendant. Besides, it does not appear that there was any collusion between the plaintiff and the sheriff; it was therefore unnecessary for the latter to enquire whether the plaintiff had assigned over his equitable interest to others, or not.

Mr. Serjt. *Vaughan*, in support of the rule, relied on the case of *Winch* v. *Keeley* (*a*), where it was determined, that a Court of Law would take notice of a trust, and consider who is beneficially interested; and therefore, that a bankrupt having previously assigned a *chose in action* on a valuable consideration, might sue the debtor in his own name, for the benefit of the assignee. The plaintiff is entitled to the relief he now prays for, as the sheriff has been guilty of misconduct, for which he is liable to an attachment, as it was his duty to bring in the body of the defendant. Although the plaintiff might have given him an order to discharge the defendant, still, the sheriff was not justified in doing so, as he previously had notice that the original debt was assigned to a trustee, who alone was interested in its recovery, and who could only apply it to the purposes of

(*a*) 1 Term Rep. 619.

the trust. In point of fact therefore, his permitting the defendant to be discharged, under these circumstances, was a contempt of Court, and he is liable to an attachment for not having brought in the body, in pursuance of the rule as prayed for.

But, *per Curiam*.—It is a very different question what the sheriff should have done, and what the Court ought now to do. It is true, that before he discharged the defendant, he had notice that the plaintiff's debt had been assigned by deed to another, in trust. Why did he not then apply to the Court, or require an indemnity from the plaintiff? In strictness, such indemnity should have accompanied the notice. If, however, the sheriff has acted improperly, the plaintiff may have his remedy by an action for an escape. He has returned that "he took the body of the defendant, which he safely kept, until the plaintiff discharged him from further keeping him, whereupon he permitted him to go at large." He therefore stands in the same situation as if he had not found the defendant, for he was discharged by the authority of the plaintiff on the record; and if the party to whom the debt was assigned intended to render him responsible, he should have offered to indemnify him at the time he gave him notice of the assignment.

Rule discharged (*a*).

(*a*) In *Withers* v. *Henley*, Cro. Jac. 379, which was an action of trespass for false imprisonment against the defendant as sheriff, who received a discharge from the plaintiff in the suit, but did not obey it, the Court held, that he was to take knowledge of the party, and accept his discharge.

1822.

Friday, Feb. 1.

Samwell v. Rebecca Jenkins.

Where a married woman was arrested as the drawer of a bill of exchange, and had given a bail-bond, the Court ordered it to be delivered up to be cancelled.

Mr. Serjt. *Lawes*, on a former day in this Term, had obtained a rule *nisi*, that the bail-bond which had been entered into by the defendant *Rebecca Jenkins*, might be delivered up to be cancelled, on her making an affidavit of her coverture, and that a common appearance might be accepted for her, on an affidavit which stated that she was married to *Edward Jenkins* the elder, in 1788; that he was still alive, and that she resided with him; that her husband having been arrested, she drew a bill of exchange for 60*l*.; but that she did not represent to the plaintiff, to whom it was given, or to any other person, that she was sole and unmarried.

Mr. Serjt. *Onslow* now shewed cause, and submitted that the defendant should either have put in and perfected bail above, or waited until she could have pleaded her coverture, and that she could not be considered within the protection of the Court, as she had merely given a bail bond to the sheriff. If she had remained in custody, she might have been discharged on entering a common appearance, but that a distinction must be drawn, where a defendant only gave a bail-bond to the sheriff, and had not put in bail above.

But the Court observed, that there was no ground whatever for such a distinction, and that in point of principle, the defendant must be considered as remaining in custody.

Rule absolute (*a*).

(*a*) In Tidd's Practice, vol. i. 7th edit. 220, it is laid down, that in an action against a *feme covert* only, the Court, upon her own affidavit of the marriage, and that her husband is alive, will discharge her out of custody; or if she has given a bail-bond, will order it to be delivered up to be cancelled, on filing common bail, or entering a common appearance, and *Pritchett* v. *Cross*, 2 Hen. Blac. 17. and *Wilson* v. *Serres*, 3 Taunt. 307, are referred to in support of that position.

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WHITELEGG *v.* RICHARDS, Gent. one, &c.

Monday, Feb. 4.

Where, in an action on the case against an officer of the Insolvent Debtors' Court, for improperly drawing up an order for the discharge of an insolvent, instead of his further imprisonment, the declaration alleged, that such officer *wrongfully*, falsely, and unlawfully made and issued a certain order, purporting to be an order from the Court:—Held, on general demurrer, that as it was throughout the declaration averred as purporting to be, and treated as an order, and had not been repudiated or rescinded by the Court itself, the action could not be maintained by a creditor of the insolvent against the officer, for the discharge of the former out of custody, under such order.

THIS was an action on the case, brought against the defendant as one of the clerks of the Insolvent Debtors' Court, for improperly drawing up an order for the discharge of an insolvent, instead of his further imprisonment, in consequence of which, he was discharged out of custody. The first count of the declaration stated, that the plaintiff, on the 24th *October*, in the first year of his present Majesty, in the Court of Common Pleas at *Lancaster*, before certain Justices there, by the consideration and judgment of the same Court, recovered against one *Strettell Charlton*, 90*l.* 11*s.* 4*d.* which were adjudged to the plaintiff in and by the said Court, for his damages by him sustained, as well on account of the not performing certain promises and undertakings before then made by *Charlton* to the plaintiff, as for his costs and charges by him the plaintiff about his suit in that behalf expended, whereof *Charlton* was convicted, as by the record and proceedings thereof, still remaining in the said Court, more fully and at large appears; that on the 21st *June*, in the year aforesaid, in the said Court of Common Pleas at *Lancaster*, the said action then depending in the said Court, upon application of *Charlton*'s bail to surrender their principal, it was ordered by the said Court, that *Charlton* should be forthwith committed to the custody of the keeper of the gaol of the county of *Lancaster*, as to the said action, and that his bail from their recognizances should be wholly discharged, and *Charlton* was thereupon committed to the custody of such keeper, as to the said action, and remained in his custody as to the said action from thence until the discharge of *Charlton*;—that *Charlton* being so in custody, on the 7th *November*, 1820, applied by petition to the Court for the relief of Insolvent Debtors, for his discharge from such confinement, according to the provi-

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sions of the statute in such case made and provided; and that the said Court, on the 13th *November*, in the year aforesaid, ordered and directed that the prisoner (*Charlton*), instead of being brought before the said Court for relief of Insolvent Debtors for 'final examination, touching the matters of his petition and schedule, should be examined touching the matters aforesaid before his Majesty's Justices of the Peace for the county of *Lancaster*, in open Court, at the adjourned General Quarter Sessions of the Peace, to be holden at *Lancaster*, in and for the said county, on the 2d *January* then next; and in case it should appear to such Justices, upon such examination, or by evidence, that the prisoner was entitled to the benefit of the said act, then that the said Justices should so declare and adjudge, and should certify the same to the said Court for the relief of Insolvent Debtors; and that in case it should appear to the said Justices, by such examination, or by evidence, that the prisoner had contracted any debts, against which he should seek to be discharged, fraudulently, or without any reasonable expectation, at the time of contracting the same, of being able to pay the same, or should, with intent to conceal the state of his affairs, or to defeat the objects of the said act, have destroyed or otherwise wilfully prevented the production of any books, papers, or writings relating to such of his affairs as were subject to investigation under the act, or should have kept false books, or made false entries, or have wilfully and fraudulently altered or falsified any such books, papers, or writings, or should in any respect, have been guilty of fraud, in contracting, discharging, or concealing any debt due from him the prisoner to any of his creditors, or should have fraudulently made away with, charged, mortgaged, or concealed any part of his property, of what kind soever, either before or after the commencement of his said imprisonment, for the purpose of diminishing the sum to be divided amongst his creditors, or of giving an undue preference to any of the said creditors, or that the said prisoner should

have put any of his creditors, as should have proved their debts, to unnecessary expence, by any vexatious or frivolous defence, or improper delay in any suit for recovering the same, or that the said prisoner should have wilfully or fraudulently omitted any effects or property whatsoever, to the value of not less than 20*l.* in the whole, in the schedule, which the prisoner should first have delivered into that Court, then such Justices should so declare and adjudge; and should also declare and adjudge, in like manner, and subject to the same limitations as are in the said act mentioned and imposed in such cases, upon the said Court for the relief of Insolvent Debtors, for what period of time the prisoner should remain in actual custody, before he should be discharged from custody by virtue of the said act; and that the said Justices should forthwith certify the same to the said Court for the relief of Insolvent Debtors; and if the said Justices should be of opinion that the prisoner was so entitled to be discharged, it was further ordered, that he should in open Court, before the said Justices, subscribe and take the oath annexed to the duplicate of the said schedule, and should execute the warrant of attorney therewith sent, and sealed with the seal of the said Court for relief of Insolvent Debtors; and it was further ordered, that the whole of the proceedings should be forthwith returned by the said Justices to that Court.—The plaintiff then averred, that at the adjourned General Quarter Sessions of the Peace for the county of *Lancaster*, holden at *Lancaster*, on the 2d *January*, in the first year of his present Majesty, *Charlton* was examined by the Justices of the Peace then and there assembled at the Sessions, in open Court, according to the form of the statute in such case made and provided, and on the day and year last aforesaid, the said Justices did certify to the said Court for the relief of Insolvent Debtors, that the prisoner had that day, pursuant to an order of that Court and the said act, been examined before the said Justices there assembled in open Court, at the then present General Quarter Sessions of the

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Peace, touching the matters of his petition and schedule, mentioned in the said order, and due proof having been made before the said Justices, at the said time and place, of the service of the respective copies of the said order, and such other notices of such proceedings as were required by the 21st section of the said act, and by the said order and rules of Court thereto annexed; and the prisoner having, in open Court, before the said Justices, subscribed and taken the oath annexed to the duplicate of the said schedule, and executed a warrant of attorney, as required by the 25th section of the said act; the said Justices adjudged and declared the prisoner entitled to the benefit of the said act, as to all the creditors of the prisoner, or persons claiming to be creditors, mentioned and described in the duplicate of the said schedule;—but the said Justices further declared and adjudged, that the prisoner had contracted the debt due to the plaintiff, mentioned in his schedule, without any reasonable expectation, at the time of contracting the same, of being able to pay the same; and also, that he had put the plaintiff, who had proved his debt in the manner required by the said act, to unnecessary expence, by a frivolous defence in an action at law in the Court of Common Pleas at *Lancaster*, for recovering the same; and the said Justices therefore also declared and adjudged, that such prisoner should remain in actual custody at the suit of the plaintiff, for the space of two years, before such prisoner should be discharged from custody by virtue of the said act.—The plaintiff then averred, that the certificate was afterwards in due manner, transmitted and delivered to the said Court for relief of Insolvent Debtors; and that before and at the time when the certificate was so transmitted and delivered as aforesaid, the defendant was, and from thence hitherto hath been, and still is, a clerk and officer of the said Court, before then appointed by the same Court; and that it was the duty of the defendant, as such clerk and officer, to have written, made out, and issued a certain order of the said Court for relief

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of Insolvent Debtors, ordering and directing that the prisoner should be discharged from custody, when and so soon as he should have been in such actual custody for the full period of time expressed in such certificate as aforesaid:—Yet that the defendant, so being such clerk and officer as aforesaid, well knowing the premises, but not regarding the duty of his office as such clerk and officer, and *wrongfully and maliciously* contriving and intending to injure, prejudice and aggrieve the plaintiff in this behalf, and to cause *Charlton* forthwith to be discharged from such custody, without paying or satisfying the said damages and costs, and to deprive the plaintiff of the means of recovering the same, afterwards, and whilst *Charlton* remained in such custody as aforesaid, at the suit of the plaintiff, for the cause aforesaid, and whilst the said damages and costs were wholly unsatisfied to the plaintiff, to wit, on the 13th *January*, 1821, without any authority from the said Court for relief of Insolvent Debtors, wrongfully, falsely, and unlawfully wrote, made out, and issued a certain order, purporting to be an order from the said Court, bearing date the same day and year last aforesaid, entitled "In the matter of the petition of *Strettell Charlton*, a prisoner, in actual custody in the castle of *Lancaster*, seeking the benefit of the act passed in the 1st *Geo.* 4, for the relief of insolvent debtors in *England*," and directed to the keeper or gaoler of the said gaol or castle, and purporting thereby, that the said Court for relief of Insolvent Debtors, upon reading a certificate that the said prisoner had, pursuant to an order of that honorable Court, been heard and examined, touching the matter of his petition and schedule mentioned in the said order, and declared and adjudged entitled to the benefit of the said act, the said Court did order that the prisoner should be discharged from custody as to the plaintiff, at whose suit the prisoner was detained in the custody of the said keeper or gaoler:—whereas, in truth and in fact, the said Court for relief of Insolvent Debtors, did not at any time pronounce any such

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order as last aforesaid, or give any authority to the defendant to write, make out, or issue the same:—By means whereof, the said last-mentioned order being, on the 16th *January*, 1821, aforesaid, exhibited and shewn to the keeper or gaoler of the said gaol or castle, *Charlton* was thereupon forthwith discharged from custody as to the said action, and suffered and permitted to go at large wheresoever he pleased, without the leave or licence, and against the will of the plaintiff; and *Charlton* did go from and out of such custody wheresoever he pleased, the said damages and costs then and still being and remaining wholly unsatisfied to the plaintiff:—By means whereof the plaintiff hath been greatly injured and aggrieved, and hath lost all means of enforcing payment from the said *Charlton*, of the damages and costs aforesaid.

There were four other counts, in substance the same as the first, but in which the orders were not so fully set forth. The defendant demurred generally to the whole declaration, and the plaintiff joined in demurrer.

The cause came on for argument on a former day in this Term, when

Mr. Serjt. *Vaughan*, in support of the demurrer, submitted that under the circumstances, the injury complained of was not of an individual nature, which could be made the ground-work of a civil action as against the defendant. To shew this, it is only necessary to look at the record, and the statute 1 *Geo.* 4. *c.* 119, under which the defendant was appointed an officer of the Insolvent Debtors' Court, The order stated in the declaration must be taken as the order of that Court, and issuing out of it as a Court of record, acting in the administration of justice. It was the duty of the magistrates below to examine whether the prisoner *Charlton* was entitled to the benefit of the act, and certify the same to the Commissioners of the Insolvent Debtors' Court, who were then empowered to make an

order for the further imprisonment of the insolvent. The order therefore must be considered as the order of the Court, although the officer might have acted improperly, or even flagrantly, in drawing it up; for by the first section of the statute, it is expressly provided, that the Court shall be a Court of record for all the purposes of the act, and have the power of removing any of the officers who shall be guilty of any negligence, wilful or unnecessary delay, or other misconduct whatsoever. If therefore, the defendant as such officer has been guilty of misconduct, he is not responsible to any individual as to the correctness of the order, but only to the Court for the due discharge of his duties. By the fourth section of the statute, persons in custody for debt may apply to the Court by petition in a summary way for their discharge; and by the twenty-first section, the Court is empowered to direct a final examination to be taken at the Quarter Sessions, and that in case it shall appear to the Justices there, that a prisoner shall have acted fraudulently, they were so to declare, and also adjudge for what time such prisoner should remain in actual custody, before he should be discharged by virtue of the act, and certify the same to the Court to be established by virtue thereof, and that thereupon *such Court should order and direct*, that the prisoner should be discharged from custody when he should have been in such actual custody for the full period of time expressed in such certificate. The Insolvent Debtors' Court alone, therefore, is empowered to make the order, and not their officer, who may be considered merely as their secretary; for that Court is authorized to treat fraudulent conduct as a criminal act of a debtor, and may imprison him by its sentence accordingly. The statute has materially altered the principle of the common law on which protracted imprisonment was founded, and by fixing gradations of time in the confinement, has changed the duration of imprisonment from an individual remedy to a judicial infliction. A creditor cannot discharge a debtor impri-

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soned for a specific purpose, at his pleasure, though he is still, for formal purposes, detained at his suit; because previous criminality, not present refusal of payment, is the ground of the sentence of the Court. Even if such creditor has this power, he cannot employ it to the recovery of his debt, because the property of the debtor is conveyed away, and all his future effects are still liable to the debts contracted before his discharge. The Court therefore, has taken the remedy out of the hands of the creditor, as much as a party sentenced for crime is out of the reach of the individual prosecutor, whom his crime was more immediately calculated to injure. By the twenty-third section of the act, it is provided, that the order of the Court for the discharge of a prisoner shall in all cases be final, unless obtained fraudulently; in which case it may be lawful for the creditor to apply to the Court to direct the prisoner to be brought again before them, and that it shall be lawful for them to re-hear the matter, and make such further order as to them shall seem fit in execution of the powers of the act; and that in case the Court shall entertain any doubt touching the examination of a prisoner, it shall be lawful for them to remand him to custody, and afterwards cause him to be brought up for examination as often as to them shall seem fit. As this statute must receive a liberal construction, it follows that under that section, if an order be issued by mistake, it is not to be considered as final, nor is the Court to be bound by it, but may rescind it, or issue another, as they were empowered to do in cases of fraud. The plaintiff therefore, has not sustained any injury by the issuing of the order in question, nor has he been deprived of any remedy that he might otherwise have derived under it against his debtor, as the Court might order him to be brought up again at any time they might think proper. Here, the plaintiff has not treated the order as the act of the Court, but of its officer; and he has not shewn in his declaration that he had any personal interest in the detention or discharge of the prisoner, which could enable

him to sustain an action. If the Court had thought proper to set aside the order there could be no ground whatever for the plaintiff's interference; and if it stands as an order, though improperly issued, still it must be considered as the order of the Court, until it be set aside or rescinded, and an application should have been made to them in the first instance, when they would have set it right, and removed their officer, if it appeared he had been guilty of any negligence or wilful misconduct. At all events, however improperly the order may have been issued, this Court has no jurisdiction to reverse it, or determine whether it be valid or not; for as long as it is in existence as an order, it must be considered as the order of the Insolvent Debtors' Court, and binding on the parties. Although the defendant as an officer of that Court, was empowered to issue orders in their name, still it was not incumbent on him, with reference to a party, to issue a right order, but it was the duty of the Court to take care that the order should be properly issued; for the duty of the officer is to the Court alone, and that of the Court to the party. It therefore follows, that a breach of duty by the former cannot be made the ground of action, for it is not a wrong towards an individual, or a misfeasance for which he can have any remedy, as it affects the administration of public justice, and cannot be the subject of an action. No instance can be found, in which an officer, situated as the defendant is, has been holden liable in a case of this description. Although in *Smith* v. *Winford* (*a*), there is a precedent of a declaration against a prothonotary of this Court for irregularity in signing a *supersedeas*, still, the plaintiff in that case, did not enter the issue in due time for trial, nor did it afterwards come before the Court on demurrer, and consequently no point was there decided. But on the broad principle, that the order in question must be considered as the act of a Court of record, which has not been rescinded or repudiated by such Court, al-

(*a*) 1 Lutw. 96.

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though the plaintiff might have sustained an injury by its having improperly issued, he has still no civil remedy against the defendant, who must be merely considered as the ministerial officer of the Court.

Mr. Serjt. *Taddy*, *contrà*.—The defendant having demurred generally to all the counts in the declaration, if either of them be sufficient, the plaintiff is entitled to judgment. In the first, the order is expressly alleged not as being an order of the Court; for the breach assigned is, that the defendant being their clerk, and without any authority from the Court, wrongfully, falsely, and unlawfully made out and issued a certain order, *purporting to be* an order from the Court, whereas in fact the Court did not pronounce any such order, or give any authority to the defendant to issue the same. It must therefore be taken to have been issued, not only without the authority of the Court, but wrongfully and maliciously; for by the demurrer, the defendant has admitted that it was no order of the Court, and that it was not issued by their authority. It must be considered therefore, that the defendant, as their officer, caused the order to be issued to the prejudice of the party at whose suit his debtor was to be detained in custody, such officer knowing at the time that they had not authorized him to discharge such person out of custody. It is also averred in the declaration, that the plaintiff had sustained an injury by the discharge of the prisoner, as he had lost all means of enforcing payment from him of the damages and costs of the action brought by the plaintiff to enforce payment of the original debt, and if the order had been properly drawn up, it would have shewn that the plaintiff had an interest in detaining the prisoner as his debtor, as the Justices below had adjudged that he should remain in custody at the suit of the plaintiff for two years, as he had put him to unnecessary expence by frivolously defending an action at law, brought by the plaintiff as the original creditor, and at whose suit alone his debtor was detained in custody. Although by

the twenty-first section of the act, the Justices, in case it shall appear to them that a prisoner shall have contracted any debts without any reasonable expectation at the time of contracting them, to be able to pay them, are empowered to adjudge what time such prisoner shall remain in custody, before he shall be discharged by virtue of the act; and by the twenty-third section, a creditor may apply to the Court to have the prisoner brought before them, and re-hear matters alleged against him in cases of fraud; and, by the twenty-fifth section, when an order for the discharge of a prisoner is made, the Court may order that judgment shall be entered up against him in one of the superior Courts;—still by the seventeenth section it is enacted, that when it shall appear to the Court that a prisoner shall have acted fraudulently, it shall be lawful for them to order that he shall not be discharged out of custody by virtue of the act, until he shall have been in custody, at the suit of some one or more of the persons who were creditors at the time of his petitioning the Court, for such period, not exceeding three years, as they should direct. That clause therefore, applies to an imprisonment at the suit of a creditor; and if the objections raised for the defendant to this form of action, prevail, they would apply equally to all actions of escape; for it is expressly averred in the declaration, that the plaintiff has lost any remedy he might have of enforcing payment from his debtor, in consequence of his having been permitted to go out of custody by the improper issuing of the order in question. If he had remained in confinement, he might be induced to apply to his friends to come forward and procure his release, by satisfying the plaintiff, at whose suit he was detained, and the latter therefore, had an interest in such confinement, notwithstanding the statute in question; for if his debtor paid the debt and costs of the action within two years, he would be entitled to his discharge. [Lord Chief Justice *Dallas*.—The commissioners of the Insolvent Debtors' Court, on the petition of the prisoner for his discharge, ordered that he

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should be examined before the Justices of the Court of Quarter Sessions at *Lancaster*, who were to inquire into the nature of the debts he had contracted, as well as the conduct of the prisoner at the time, and since they were contracted: that they accordingly certified to the Court, that the prisoner had contracted the debt due to the plaintiff without any reasonable expectation of being able to pay the same, and that he had put him to unnecessary expence in his attempt to recover the same by an action at law; and they therefore adjudged that he should remain in custody two years before he should be discharged by virtue of the act. The sentence of the imprisonment was therefore intended as a punishment for the misconduct of the insolvent, in fraudulently contracting the debt, and he was consequently ordered to be imprisoned two years from the time of the adjudication by the Justices, and not from the time of contracting the original debt. The prisoner therefore, had rendered himself amenable to a judicial sentence by his misconduct, as in any other case of a criminal misdemeanor; and although the plaintiff was apparently the only creditor, there might have been many others on whom the order of the Court would be equally operative as on him.] The law presumes that a creditor may derive advantage from the imprisonment of his debtor; for by his detention in custody can he only derive any prospect of the payment of his debt, and here the plaintiff has received not only a loss, but an injury by the improper issuing of the order in question, which was not authorized by the Court; and as it was done without their knowledge or sanction, their officer must be equally liable as in the case of an escape, as the prisoner was discharged through his negligence or misconduct alone. [Lord Chief Justice *Dallas*.—The order professes on the face of it to be an order of the Court. It therefore appears to me that an application should have been made to them in the first instance, to set it aside, if it had been improperly issued; and although the party was discharged, still as it was

done without their authority, they were empowered to issue another order. In this Court, if an officer inadvertently draws up a rule as absolute, when it is only a rule to shew cause, an application must be made to the Court, shewing that *improvidè emanavit*. So, if a judgment be by mistake signed in vacation, it may be amended by an order of the Court.] Here it was not necessary to apply to the Court to rescind or set aside that which was not their order. The defendant had no jurisdiction whatever to issue it. It was therefore altogether a nullity. In order to found an application to set it aside, it must have been well instituted in the first instance, and had its origin out of the Court from which it purported to be issued, by their order and under their sanction. At all events, it has been admitted by the demurrer, that the defendant acted maliciously; for it is stated in the breach of the first count of the declaration, that he wrongfully and maliciously intending to injure the plaintiff, issued the order wrongfully, falsely, and unlawfully; and from *Drewe* v. *Coulton* (*a*), it seems that an averment *wrongfully* intending to injure, is equivalent to *maliciously*; for it was there held, that a declaration charging, that the defendant, knowing, &c. and *wrongfully* intending to deprive the plaintiff, &c. hindered him from giving his vote, &c. was a sufficient allegation of malice. [Mr. Justice *Richardson*.—That case was a mere *nisi prius* decision on a ground wholly different from those raised in the present; and in *Sutton* v. *Johnson* (*b*), it was determined, that an action for a malicious prosecution would not lie, if probable cause appeared in the proceeding; for that malice and the want of probable cause were both necessary to support such an action.] The case of *Smith* v. *Winford* cannot be considered as an authority on which to ground any of the objections which have been raised as to the plaintiff's inability to recover in the present action, and more particularly so, as the defendant might have taken issue and gone to trial,

(*a*) 1 East, 563 (n). See also *Bernardiston* v. *Some*, 2 Lev. 114. 3 Lev. 39. S. C. 1 East, 568 (n).——(*b*) 1 Term Rep. 518.

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neously. And in every Court, instances are familiar, of applications being made to amend rules and orders, so as to make them conformable to those which were originally pronounced, or to what originally such rules or orders ought to have been. But until such application and further order thereon, a rule or order issued remains an act of the Court itself.

In this instance, no amendment has been made, and consequently the order in question still appears upon the face of it to be the order of the Court, and must be taken as such.

The declaration alleges that the defendant made and issued a certain order, purporting to be an order of the Court, (treating it therefore as an order in itself,) averring only that in fact no such order was made out, but it appearing to be an order, and by the declaration averred as purporting so to be, we think it must be considered as such, not having been repudiated or disclaimed by the Court itself, and consequently that the action cannot be maintained.

To this point we confine our decision, not meaning to give any opinion whether under different circumstances, and if so, still less under what circumstances, such an action can be maintained, holding it sufficient for the present purpose to say that there must be in this case

Judgment for the defendant (*a*).

(*a*) This judgment was afterwards reversed by the Court of King's Bench, in error. See 3 Dow. & Ryl. 237.

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MAIDMENT and Wife, Plaintiffs; PROCTOR, Deforciant.

Tuesday, Feb. 5.

If the caption of a fine abroad be stated to have been taken before *A.* and *B.*, and the affidavit of such caption states, that it was taken before *A.* and *C.* the Court will not permit such fine to pass.

MR. Serjt. *Lens* moved that this fine might be now permitted to pass, notwithstanding an objection had been made to it by the officer of the Court, on the following ground:— It appeared that the caption had been taken in *India*, before two commissioners there, by the names of *Savage* and *Donaldson*, and that the affidavit of such caption stated, that it had been taken before *Savage* and *Montgomery*. It also appeared, that these three persons were commissioners and all named in the *dedimus*, but there was no affidavit which stated that the caption was taken before *Savage* and *Donaldson*, and therefore those two documents did not correspond with each other, as to the names of the two commissioners before whom the caption was taken.

The Court held that the objection by the officer was well founded, and the learned Serjeant took nothing by his motion.

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Tuesday, Feb. 5.

Where the defendant had suffered judgment by default in an action of debt on bond conditioned for the performance of covenants and payment of costs in chancery, and afterwards filed a bill for an injunction:—Held, that although the plaintiffs delayed executing a writ of inquiry more than a year after interlocutory judgment was signed, it was not necessary to revive such judgment by *scire facias* before execution, as the defendant attempted to delay it by filing the bill for an injunction.

MR. Serjt. *Lawes*, on a former day in this Term, had obtained a rule *nisi*, that all the proceedings taken by the plaintiffs in this cause, subsequent to signing judgment therein, might be set aside for irregularity with costs, on an affidavit which stated, that this action was commenced in *Hilary* Term, 1820, to recover the sum of 1000*l.*, being the penalty of a bond entered into by the defendant to the

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plaintiffs, conditioned by him for the performance of covenants and the payment of costs to the plaintiffs, incurred, and to be incurred by them in certain causes then depending in Chancery; that the defendant suffered judgment by default in the *Easter* Term following; that on the 4th *July*, 1821, the plaintiffs' agent delivered to the defendant's attorney a suggestion of breaches, together with a notice that a writ of inquiry would be executed before Lord Chief Justice *Dallas*, at the Sittings after the then *Trinity* Term; that on the 7th of that month, another notice was served on the defendant's attorney, appointing a writ of inquiry to be executed at the Sittings after the then next *Michaelmas* Term, and that it was accordingly executed, and the plaintiffs obtained a verdict for 585*l.*;—whereas their only demand on the defendant before the commencement of the action, was 347*l.* 16*s.* 4*d.*; that the defendant had a good defence at law to a great part of the plaintiffs' demand, and that the amount of the verdict so taken would have been very considerably reduced, had he attended the execution of the inquiry, as he could have proved the payment of several other sums to the plaintiffs.—Under these circumstances, the learned Serjeant contended, that the judgment had been irregularly signed, and that the notice for executing the writ of inquiry of the 7th *July* was irregular, as the defendant was entitled to a Term's notice of the plaintiffs' intention to proceed, in which case they could not have executed their writ of inquiry until the present Term; that it was at all events necessary for the plaintiffs to have revived their judgment by a writ of *scire facias*, as more than a year and a day had elapsed since the day on which such judgment was signed, in which case the defendant might have pleaded the subsequent payments made by him, and thereby secured himself from further injury. He relied on the case of *Howe* v. *Acton* (*a*), where Lord Chief Justice *Holt* held, that if the plaintiff delay

(*a*) 12 Mod. 500. But see Tidd's Practice, 7th edit. vol. ii. 1136.

executing his writ of inquiry till the expiration of a year after interlocutory judgment signed, he could not do it afterwards without a *scire facias*. Here, therefore, a *scire facias* should have been issued, and the breaches of the condition embodied in the writ.

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Mr. Serjt. *Taddy* now shewed cause on an affidavit which stated that the defendant had filed a bill for an injunction against the plaintiffs, in order to restrain them from taking out execution, which was not dissolved until *May*, 1821; that the plaintiffs on the 4th *July* following, gave the defendant notice that a writ of inquiry would be executed at the Sittings after the then *Trinity* Term, and that finding that to be irregular, as no steps had been taken for four Terms, another notice was delivered on the 7th *July* following, for executing such writ at the Sittings after the last *Michaelmas* Term;—and he relied on the case of *Michell* v. *Cue* (*a*), where it appearing that the whole delay had arisen on the part of the defendant, by bills in Chancery for injunctions, and for obtaining time for payment, &c.; the Court were of opinion, that the rule of reviving a judgment of more than a year old by *scire facias* before execution, ought not to be taken advantage of by a defendant who had been trying methods whereby he might delay the plaintiffs.

The Court observed, that that case was expressly applicable to the present, and that a *scire facias* was not necessary where execution had been delayed by the acts of the defendant himself, and that the Court there said, that the reviving of such judgment by a *scire facias* before suing out execution upon it, was intended to prevent a surprize upon the defendant. Here, the defendant could not be surprized, as he himself had filed a bill for an injunction, for the express purpose of preventing the plaintiffs from suing out execution, and if they had done so before the injunction was dissolved, they

(*a*) 2 Burr. 660.

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would have been guilty of a contempt as to the proceedings in the Court of Chancery.

Rule discharged, with costs (*a*).

(*a*) See Tidd's Practice, 7th edit. vol. ii. 1137.

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ANONYMOUS.

If a parish be misdescribed by name in a fine and deed to lead the uses, the former may be amended by substituting the right name, if the deed contains general words, under which the premises in such parish may pass.

MR. Serjt. *Hullock* moved to amend this fine by substituting the parish of *Manfield* for *Mansfield*, on an affidavit which stated, that it was passed in 1815, and that it was the intent of the parties to pass lands situate in the parishes of *Yarme* and *Manfield*, in the county of *York*; that there was no parish by the name of *Mansfield* in that county, and that the parties were all alive. It appeared by the deed to lead the uses, that the premises were described as situate in the parishes of *Yarme* and *Mansfield*, in the county of *York*, as well as all property belonging to the plaintiffs in that county, *Durham*, *Lancashire*, or elsewhere, together with all houses, lands and hereditaments, to the same appertaining or belonging.

The Court, on the grounds that the deed contained general words sufficient to pass the premises in *Manfield*, and as it was sworn that all the plaintiff's property in the county in which that parish was situate as elsewhere, was intended to pass, they, on an affidavit stating that the possession had followed, and been in conformity to the deed to lead the uses,

Allowed the amendment.

1822.

RUSSELL and Another *v.* MOSELEY.

Wednesday, Feb. 6.

THIS was an action of *assumpsit*. The first count of the declaration stated, that on the 26th *April*, 1816, one *Harriet Moseley* was indebted to the plaintiffs, carrying on trade under the firm of "*R. T. Shortridge & Co.*," in the sum of 112*l.* 4*s.* 4*d.* upon a balance of accounts between her and them, and that in consideration that they, at the request of the defendant, would continue to contract with and sell her such goods as she might have occasion for in the plaintiffs' trade and business of glass-merchants, the defendant promised the plaintiffs to guaranty the account of the said *Harriet* due to them, of 112*l.* 4*s.* 4*d.*, and what she might contract from the said 26th *April*, 1816, to the 30th *September* then next ensuing. The plaintiffs then averred, that they, confiding in the undertaking of the defendant, did, on the said 26th *April* aforesaid, and on divers other days between that day and the said 30th *September*, continue to contract for and sell to the said *Harriet* such goods as she had occasion for, and did accordingly contract for and sell her certain goods in their said trade and business of glass-merchants, which she had occasion for, of the value of 150*l.*; and that although the time for payment of the price of the said goods by the said *Harriet* hath long since elapsed, yet that she hath not (although often requested so to do) as yet paid the said several sums of 112*l.* 4*s.* 4*d.* and 150*l.* or either of them to the plaintiffs, but hath refused so to do, of which the defendant had notice; yet that he not regarding his undertaking, did not guaranty or pay the plaintiffs the said account of the said *Harriet Moseley*, of 112*l.* 4*s.* 4*d.* or 150*l.* for the goods so contracted for and sold to her as aforesaid, but wholly neglected so to do. The second count was nearly similar to the first; and the third stated, that in consideration that the plaintiffs would contract with and sell to the said

The defendant gave the following note to the plaintiffs, which he dated and signed:—"I hereby guaranty the present account of Miss *H. M.* due to *R. T. S. & Co.* (the plaintiffs), of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30th *September* next:—it seems that the consideration sufficiently appeared on the face of the instrument to bind the defendant, under the 29 *Car.* 2. *c.* 3. *s.* 4.

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Harriet Moseley all such goods as she might contract for from the 26th *April*, 1816, to the 30th *September* next ensuing; the defendant undertook to guaranty such sums as might be due in respect of such goods, and assigned a breach accordingly. There were also counts for goods bargained and sold, goods sold and delivered, and the common money counts. The defendant pleaded the General Issue.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last *Trinity* Term, it appeared that the plaintiffs had supplied the defendant's sister with goods to the amount of 112*l.* 4*s.* 4*d.* and had refused to allow her any further credit unless she gave them a security, on which she referred them to her brother, the defendant, who gave them the following guarantie:—

"*London, 26th April*, 1816.

"I hereby guaranty the present account of Miss *Harriet Moseley*, due to *R. T. Shortridge & Co., South Shields*, of 112*l.* 4*s.* 4*d.* and what she may contract from this date to the 30th *September* next.

"*G. B. Moseley.*"

His Lordship being of opinion that no sufficient consideration for the promise was expressed on the face of the instrument, directed a nonsuit; but leave was given the plaintiffs to move to set it aside and enter a verdict for them for 130*l.* or any less sum the Court should think they might be entitled to recover under the guarantie.

Mr. Serjt. *Hullock* having in the last Term accordingly obtained a rule *nisi*, submitted that the consideration for the promise sufficiently appeared on the face of the instrument; or that it did so at all events as to the debt due from the defendant's sister to the plaintiff's for goods furnished her by them anterior to the guarantie, and he observed, that this case was distinguishable from those of *Jenkins* v. *Reynolds* (*a*), and *Saunders* v. *Wakefield* (*b*), as in the one, no consideration whatever was expressed in the letter written by the de-

(*a*) Ante, 86.——(*b*) 4 Barn. & Ald. 595.

fendant to the plaintiffs, and in the other, parol evidence must have been admitted to prove the consideration for which the promise was made.

Mr. Serjt. *Vaughan* now shewed cause, and insisted, that on the authority of *Wain* v. *Warlters* (*a*), which has been confirmed by subsequent decisions, it is now established, that an agreement to pay the debt of another must be in writing, and contain the consideration for the promise, as well as the promise itself. Here, although the guarantie contains a promise to pay, the consideration on which it is founded does not appear, for the undertaking by the defendant to guaranty what his sister might contract from the date of the instrument, might refer either to money or goods, and it would be therefore necessary to resort to parol evidence to explain the terms of the instrument, which was the very mischief sought to be guarded against by the statute of Frauds. In order to shew that the guarantie in question is ambiguous in terms, it is only necessary to refer to the late decision of the Court of King's Bench in *Saunders* v. *Wakefield*, and the reasoning of Lord Chief Justice *Abbott*, who there said (*b*), "It is impossible to suppose that the statute of Frauds, which was intended to correct the common law, can apply to cases in which, at common law, when the promise was not in writing, there was previously no remedy. Now, at common law, no action would lie, unless there was some specialty or peculiarity in the promise. It is impossible to conceive how there can be such specialty, unless the consideration for the promise be stated; for it is the consideration which makes it a special promise. The consideration, therefore, must have been in the contemplation of the legislature, when they used the words 'special promise.'"—Here the defendant, in the former part of the guarantie, merely engaged to pay the account of his sister then due to the plaintiffs, and it does not appear of what that account consisted; and

(*a*) 5 East, 10.——(*b*) 4 Barn. & Ald. 600.

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by the latter part of it he agreed to pay what she might contract from the date of the guarantie to the 30th *September* following. It does not appear how, or for what she might contract. It might be either for money to be lent or goods to be sold; and as the guarantie is ambiguous on the face of it, the plaintiffs were properly nonsuited at the trial.

Lord Chief Justice DALLAS.—The defendant guaranteed the account of his sister due to the plaintiffs at the time of the guarantie, amounting to 112*l.* 4*s.* 4*d.* It now appears to me that such account might have been looked at, in order to ascertain the nature of the articles furnished;—and what she might contract from the date of the guarantie to the month of *September* following, might be taken to apply to the same description of articles as had been before furnished.

Mr. Justice PARK.—In *Jenkins* v. *Reynolds*, the defendant addressed a letter to the plaintiffs, in which he merely stated, that they might consider him as security on *J. C.'s* account to the amount of 100*l.*, without stating any consideration for such undertaking.

Mr. Justice BURROUGH.—In *Saunders* v. *Wakefield*, there was no consideration whatever for the promise, and the engagement by the defendant, which was there reduced into writing, afforded no ground of action of itself.

Mr. Justice RICHARDSON.—The guarantie in question refers to an existing debt in terms. If the defendant had stated, that if his sister would settle her then account, and renew it, he would be answerable for what she might contract on such new account, parol evidence might have been admitted to shew the nature of the account which was to be renewed; and here, what she might contract from the date of the guarantie, must be taken to apply to the same description of account on which she was previously indebted to the plaintiffs.

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On Mr. Serjt. *Vaughan's* consenting that a verdict should be entered for the plaintiffs for 27*l.* 1*s.* 11*d.*, being the amount of articles furnished by them to the defendant's sister, from the date of the guarantie to the 30th *September* following, and it appearing that she had given her acceptance for the greater part of the goods previously furnished, and that the plaintiffs had given her further time for payment thereof, the rule was made

Absolute.

GREGORY *v.* HURRILL.

Wednesday, Feb. 6.

Where in an action of trover brought in C. P. to try the validity of a commission of bankrupt issued against the plaintiff by the defendant as his assignee, the latter produced an office copy of a roll in the Court of King's Bench, by which it appeared that an action was commenced there against the plaintiff and his partner more than six years before, and continuances brought down to the Term before the trial in C. P.:— Held, that the petitioning creditor's debt on which the commission was founded, was not barred by the statute of Limitations, for as long as a remedy is open by which the debt may be recovered any where, it does not fall within the operation of that statute.

THIS was an action of trover, brought by the plaintiff under an order of the Vice-Chancellor, to try the validity of a commission of bankrupt issued against him at the instance of the defendant, as his assignee.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last *Trinity* Term, the trading and act of bankruptcy by the plaintiff were admitted; but it was insisted for him, that there was no valid petitioning creditor's debt on which the commission could be supported, as it was barred by the statute of Limitations, 21 *Jac.* 1. *c.* 16. the demand on which it was founded having arisen more than six years before the date of the commission, and that the plaintiff was in this country in the year 1815.—It appeared that the plaintiff had joined a person by the name of *Hipkins* in a commercial adventure to *Barbary*, and that they had appointed one *Walsh* to act as their agent, and to accept bills and pay monies on their account, for which purpose *Hipkins* had transferred money of his in the funds to *Walsh*, and *Hipkins* and the plaintiff agreed, that the proceeds of the cargo should be remitted to *Walsh*, as such agent:— that the plaintiff went abroad with the adventure in 1811, and

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that in *April*, 1815, he came home in a vessel, and went on shore at *Deal*, and proceeded to the Vice-Consul's office there, and wrote a letter, dated "The *Downs*," and after staying at *Deal* about three days, proceeded in another ship to *Sweden*, from whence he did not return until 1819: that the petitioning creditor's debt was founded on an account between the plaintiff, *Hipkins*, and *Walsh*, by which the assignees of the latter claimed 1477*l.* 11*s.* 6*d.* to be due from the former to them, as such assignees, on account of advances made by *Walsh* before his bankruptcy, the last item in which was in 1812, which was more than six years before the issuing of the commission against the plaintiff. For the defendant, an office copy of a roll in the Court of King's Bench of *Michaelmas* Term, 53 *Geo.* 3. was produced, containing an entry of three writs of *capias*, *alias* and *pluries* against the plaintiff and *Hipkins*, at the suit of the assignees of *Walsh*, the latter of which writs was brought down by continuances to the Term preceding the trial of this cause (*a*); and it was contended, that these proceedings took

(*a*) The circumstances under which the continuances were entered to the action in the Court of King's Bench were as follows:—On the 26th *June*, 1812, a writ of *special capias* was issued out of that Court, by the assignees of *Walsh* against the plaintiff and *Hipkins*, who were in partnership together, returnable on the morrow of *All Souls*, and indorsed for bail for 1000*l.* and upwards. On the 11th *December* following, writs of *alias* and *pluries* were sued out by the same plaintiffs as assignees, against the same defendants, the *alias* being returnable in fifteen days of *St. Martin*, (*Michaelmas* Term, 1812) and the *pluries* returnable in eight days of *St. Hilary*, *Hilary* Term, 1813. The defendant *Hipkins* died in *September*, 1813, and the then plaintiffs as assignees of *Walsh*, did not proceed to outlawry against *Gregory*, the surviving defendant in that action, but in *March*, 1821, struck a docket, and immediately afterwards sued out a commission of bankrupt against him. On the 17th of that month, the plaintiff commenced the present action for trying the validity of the commission; and on the 19th, the attorney for the assignees of *Walsh*, (who are the real defendants in this cause), went to the Secondaries' office in *Coleman Street*, and prevailed on the clerk there to indorse a return upon the three writs of *capias*, *alias*, and *pluries*, that *Gregory* and *Hipkins* were not, nor was either of them, found in the sheriff's bailiwick. Entries were then made on the roll as of *Michaelmas* Term, 53 *Geo.* 3, 1812, with returns of the writs indorsed thereon, on the last of which, continuances were brought down to the Term preceding the trial of this cause.

the case out of the statute. A verdict was found for the plaintiff, with leave for the defendant to move to set it aside, and enter a nonsuit, or that a verdict might be entered for the defendant, or a new trial granted:—his Lordship having reserved the point of law raised for the plaintiff, *viz.* whether the petitioning creditor's debt was a good and legal debt to support the commission; or whether it was not barred by the statute of Limitations, and whether the continuances were sufficient to take the case out of that statute?

Mr. Serjt. *Vaughan*, in the last Term, having accordingly obtained a rule *nisi*, submitted in the first place, that this case fell within the exception in the statute 21 *Jac.* 1. *c.* 16. *s.* 3 (*a*), as the account between the present plaintiff, *Hipkins*, and *Walsh* must be considered as an open or *current* account, as the latter could have no demand on the former, until the return of *Gregory* from abroad, and as he was personally attending the adventure, there could be no account stated or adjusted between them; and be referred to the distinction drawn by Mr. Serjt. *Williams*, between an open or current account and one that is stated, in a note to *Webber* v. *Tivill* (*b*), and to *Catling* v. *Skoulding* (*c*), where Lord *Kenyon* said (*d*), that "where there is no *item* of account at all within six years before the action brought, the plaintiff will be precluded, unless he can bring his case within the exception in the statute concerning merchants' accounts, and in such a case, his replication must bring his case within the statute. But it must be remembered, that there the plaintiff is not barred, though there has been no transaction of any kind between the parties for six years: for by his replication he insists, that his case never was within the statute, for that "the accounts were between merchant and merchant."—Even

(*a*) By which it is enacted, that "all actions of account (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors, or servants) must be commenced and sued within six years next after the cause of action."

(*b*) 2 Wms. Saund. 4th edit. 127, n. 6.——(*c*) 6 Term Rep. 189.——(*d*) Id. 192.

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if this case did not fall within that exception, the plaintiff has never returned to this country so as to avail himself of the operation of the statute 4 *Anne*, *c.* 16. *s.* 19(*a*), for his merely touching at *Deal* in 1815, cannot be considered a return within that statute. He should either have returned to his residence, or remained so long at one particular place, as would enable a creditor using usual diligence to serve him with process during his stay there. With respect to the action brought against the plaintiff and *Hipkins* in the Court of King's Bench, it appears to have been regularly continued until the Term before the trial of the present cause; and after the death of *Hipkins* a commission of bankrupt was sued out against the plaintiff alone, which is in the nature of a statute execution, and the commission was issued on the identical debt which was originally sought to be recovered from the plaintiff and *Hipkins* in the Court of King's Bench. Although therefore, this case may not fall within the exception in the statute of *James*; the plaintiff did not return to this country within the meaning of the statute of *Anne*: or at all events, the continuances in the action in the Court of King's Bench having been duly made, they took this case out of the operation of the former statute.

Mr. Serjt. *Hullock* and Mr. Serjt. *Lens* now shewed cause, and premised that an application had been made by the plaintiff to the Court of King's Bench, in the last Term, and that he had obtained a rule to shew cause why the return to the writ of *capias* issued out of that Court, and the subsequent proceedings thereon, should not be set aside for irregularity; that it was afterwards referred to the master, and on his reporting that the proceedings had been regular, as it was the practice to file writs, and carry in and docket rolls at any period of time for the purpose of saving the sta-

(*a*) By which it is enacted, that "if any person, against whom there is any cause of action upon the case, shall be, at the time such cause of action accrued, beyond the seas, the person entitled to the action may bring the same against such person after his return from beyond the seas, within the time limited by the 21 *Jac.* 1. *c.* 16. *s.* 7."

tute, the rule was accordingly discharged with costs. They submitted however, that although the continuances might have been regularly entered according to the practice of the Court of King's Bench, yet that it did not determine the present question as to the validity of the petitioning creditor's debt, which was clearly barred by the stat. 21 *Jac.* 1. and consequently, that the commission against the plaintiff could not be supported. Although in *Quantock* v. *England* (*a*), it was decided, that a debt at law, notwithstanding the statute of Limitations had incurred, would be sufficient to constitute a legal petitioning creditor's debt, on the ground that the statute did not destroy the debt, but only took away the remedy by action, yet if the bankrupt himself apply to set aside the commission upon that ground, the case is different, *Fowler* v. *Brown* (*b*); and in the later cases of *Ex parte Dewdney* (*c*), and *Ex parte Roffey* (*d*), it was determined, that a debt barred by the statute of Limitations at law, and in equity by analogy to that statute, could not be proved under a commission; and the Lord Chancellor there laid down the general principle to be, that it was competent to the bankrupt to take this objection upon the statute, and if he waived it, for creditors to do so. It is now therefore quite clear, that if a petitioning creditor's debt be barred by the statute of Limitations, it cannot support a commission. Here however, the question is, whether the operation of the statute was avoided by the continuances entered on the writ of *pluries* issued against the plaintiff and his late partner in the Court of King's Bench in 1812? Although they appear to have been regularly entered, it is not sufficient to take this case out of the statute; for the present writ was not only issued in a different Court, but in a wholly different action, and against the plaintiff alone. In order to avoid the statute by continuances, the declaration and subsequent proceedings must be founded on the process issuing out of the same

(*a*) 5 Burr. 2628. S. C. 2 Sir Wm. Blac. 702.——(*b*) Cooke's Bankrupt Laws, 8th edit. 21.——(*c*) 15 Ves. 479.——(*d*) 2 Rose's Bank. Cas. 245. S. C. 19 Ves. 468.

1822.

Friday, Feb. 8.

DOE, on the several Demises of NICHOLSON and Others *v.* MIDDLETON and Another.

Where, under a local inclosure act, three Commissioners, and their successors, were nominated and appointed for setting out, dividing, allotting, and inclosing waste lands, according to rules prescribed thereby, and it was provided, that all acts or things done by any two of the Commissioners appointed, or to be appointed by virtue of the act, should be as valid and effectual, as if the same were done by all the said Commissioners; and it was further provided, that if any of them should die, or become incapable to act for the space of forty days, when occasion should require his or their attendance for carrying the act into execution, a new Commissioner, or Commissioners, should be elected and appointed in his or their stead:—Held, that an assessment made by two Commissioners, after the death of one of the three appointed by the act, and before the election or appointment of a successor, was invalid, although such assessment was made for the purpose of carrying the act into execution.

By the same act, the Commissioners were required to make a statement or account of all monies received, expended, or due to them, in the execution of such act, and to lay the same before a magistrate, who was to examine and balance the same, and no charge or item in such account was to be binding, unless allowed by such magistrate. *Quære*, whether the Commissioners, having made an assessment for the costs of carrying the act into execution, could proceed for the recovery of such assessment before it was allowed by a magistrate?

THIS was an action of ejectment, brought by the lessors of the plaintiff, as surviving Commissioners appointed by a local act of Parliament passed in 1810, for "inclosing lands in the parish of *Gosforth*, in the county of *Cumberland*" (*a*), to

(*a*) By which it was enacted, that *John Nicholson*, *John Litt*, and *Joseph Cowper*, and their successors, to be appointed as thereinafter mentioned, should be, and they were thereby appointed Commissioners for setting out, dividing, allotting, and inclosing the commons and waste grounds in the parish of *Gosforth*, in the manner and according to the rules, orders, provisions, powers, and directions contained in that act, and in the statute 41 *Geo.* 3. *c.* 109. (the General Inclosure Act), therein recited, so far as the powers, regulations, directions, and provisions of the last-mentioned statute were not altered or controlled by, or repugnant to the *Gosforth* act:—By which it was further enacted, that all acts, matters, and things, *done by any two of the Commissioners* appointed, or to be appointed, by virtue of that act, should, to all intents and purposes, be as valid and effectual as if the same were done and performed by all the said Commissioners. And it was further enacted, that if any of the Commissioners appointed by the said Inclosure Act, or to be substituted in manner thereinafter mentioned, should die, or neglect, refuse, or become incapable to act, for the space of forty days, when occasion should require his or their attendance for carrying that, or the recited act of 41 *Geo.* 3. into execution, it should be lawful from time to time to elect and appoint a new Commissioner or Commissioners, in the stead of him or them so dying, neglecting, refusing, or becoming incapable to act as aforesaid. The *Gosforth* act then empowered certain persons to nominate a new Commissioner or Commissioners, in the place of those three mentioned in the act, or any future Commissioners, not interested in the inclosure, from time to time as occasion might require; and in case such new Commissioner or Commissioners should not be appointed by the party or parties therein respectively authorized to make

recover the possession of two parcels of land, late part of the commons and waste grounds in that parish, allotted by the Commissioners, and then in the occupation of the defendants, as tenants or farmers of *Skeffington Lutwidge*, Esq. for the purpose of obtaining payment of the *quantum* of an arrear of charges and expences of passing and carrying into execution the act of Parliament, due from the said Mr. *Lut-*

such appointment, within sixty days after the happening of any such vacancy, and notice thereof given by the surviving and acting Commissioners or Commissioner for the time being, in writing, then a Commissioner or Commissioners to fill up such vacancy or vacancies, from time to time, should and might be appointed by the other surviving or acting Commissioners or Commissioner for the time being, by writing under their or his hands or hand, at any meeting of such surviving or only Commissioners or Commissioner, of the time and place whereof fourteen days previous notice should have been given, &c.

The Commissioners appointed by the act were also empowered to allot and set out such parts of the commons and waste grounds as to them should seem necessary, and by sale thereof, as by the 41 *Geo.* 3. *c.* 109. directed to raise money sufficient for paying and discharging the costs and expences incident to the passing of the *Gosforth* Inclosure Act; and that in case the purchase-money arising by such sale should not be sufficient to defray certain costs, charges, and expences therein mentioned, then the deficiency was to be made up by the several persons interested in the commons and waste grounds, and paid in such shares and proportions, within such time, and to such person or persons as the said Commissioners should direct, nominate and appoint; and in case any person made subject to the payment of any money towards such costs, charges, and expences, should neglect or refuse to pay his share or proportion thereof, within the time to be appointed as aforesaid, the same might be levied and recovered in the manner directed by the said recited act of the 41 *Geo.* 3. *c.* 109. And it was further provided, that when any person should refuse or neglect to pay his proportion of the charges of passing the act, or expences attending the inclosing and fencing the allotments, at the days and times to be appointed for payment of such charges and expences, it should be lawful for such Commissioner or Commissioners, by any warrant or warrants, under his or their hands and seals, directed to any person or persons whomsoever, to cause the said costs, charges, and expences, and sum and sums of money respectively, to be levied by distress and sale of the goods and chattels of the person or persons so making default in payment as aforesaid; or otherwise, it should be lawful for such Commissioner or Commissioners, or any person or persons authorized by him or them, to enter upon and take possession of the premises so to be allotted, to such person or persons refusing or neglecting to pay as aforesaid, and to receive and take the rents and profits thereof, until thereby, therewith, or otherwise, the share or shares, proportion or proportions, should be fully paid and satisfied.

1822.

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widge, as representative and devisee of his late uncle, deceased. The declaration contained two counts, in the first of which the demise was laid by *John Nicholson* and *Joseph Cowper*, on the 2d *February*, 2 *Geo.* 4., and in the second, by *John Nicholson*, *John Litt*, and *Joseph Cowper*, on the 2d *September*, 55 *Geo.* 3. Plea, Not Guilty.

At the trial of the cause before Mr. Justice *Bayley*, at the last Assizes at *Carlisle*, it appeared that *Nicholson*, *Litt*, and *Cowper* had been appointed Commissioners by the act; that their accounts had been regularly examined and balanced by a magistrate, according to a provision contained in the act (*a*), up to the 12th *May*, 1814, and that on that day he allowed the sum of 28*l.* 10*s.* 11*d.* as being due to the Commissioners from Mr. *Lutwidge* deceased, and signed the account accordingly; that on the 28th *August*, 1815, a general award was duly executed and signed by the three Commissioners, and by which the two parcels of land in question were allotted or set out to Mr. *Lutwidge*'s testator; that *Lutwidge*, the devisee, had been in the possession or received the rents of those two parcels since the execution of the award, and that the defendants were his tenants or farmers; that *Litt* died shortly after the making of the award, and that no new Commissioner had been since appointed in his place; that *Nicholson* and *Cowper*, the two surviving Commissioners, on the 16th *January*, 1821, made an assessment for the costs and charges

(*a*) By which it is enacted, that "once at least in every year, during the execution of that act, the said Commissioners should, and they were thereby required to make a true and just statement or account of all monies by them received and expended, or due to them for their own trouble and expences, in the execution of that or the said recited act, (41 *Geo.* 3. *c.* 109;) and such statement and account, when so made, together with the vouchers relating thereto, should be by them laid before one of his Majesty's Justices of the Peace for the said county of *Cumberland* (not interested in the said division and inclosure), to be by him examined and balanced, and such balance should be by such Justice stated in the book of accounts, to be kept in the office of the clerk of the said Commissioners; and no charge or item in such accounts should be binding to the parties concerned, or valid in law, unless the same should have been duly allowed by such Justice."

of carrying the act into execution, which had not been before done; that at the time of making such assessment, they were indebted to their bankers for money borrowed, and to the solicitors for the inclosure, for business done, in sums amounting together to 357*l.* 7*s.*, the amount of the last assessment so made by them, but which had not been allowed by a magistrate; that the sum of 14*l.* 6*s.* 6*d.* was assessed upon Mr. *Lutwidge*, and required to be paid by him as his proportion, in respect of the lands for the recovery of which this action was brought, and that he had notice accordingly; but he was not required to pay the sum of 28*l.* 10*s.* 11*d.* due to the Commissioners, and duly allowed by a magistrate, in *May* 1814.

The learned Judge being of opinion that the accounts unpaid by the Commissioners to the bankers and solicitor sought to have been allowed by a magistrate before this action was brought, and as 14*l.* 6*s.* 6*d.*, the proportion of the last assessment of 357*l.* 7*s.* had been demanded from Mr. *Lutwidge*, instead of a proportion of 28*l.* 10*s.* 11*d.* being the sum allowed by the magistrate in 1814, directed a nonsuit, but gave the lessors of the plaintiff leave to move to set it aside, and enter a verdict for them, in case the Court should be of opinion that they were entitled to recover.

Mr. Serjt. *Hullock* having, in the last Term, accordingly obtained a rule *nisi*,

Mr. Serjt. *Taddy* now shewed cause, and submitted, that as the sum demanded of 14*l.* 6*s.* 6*d.*, as the assessment due from Mr. *Lutwidge*, for carrying the act into execution, had not been allowed by a magistrate, the lessors of the plaintiff had no right whatever to recover in this action, as such demand could not form any part of the proportion of 28*l.* 10*s.* 11*d.* originally allowed by the magistrate; that the power given to the Commissioners was large, and therefore ought to be construed strictly;—or that at all events, the assessment in question could not be supported, as it was

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made by two Commissioners only, whereas three were expressly appointed by the act, to represent three different and separate interests; and although two might constitute a *quorum*, still it was necessary that a third should have been appointed, or that three should have been in existence at the time of the last assessment, and before the demand in question was made. The consequence is, that neither of the demises in the declaration can be supported, as the first is laid by the two surviving Commissioners only, and the second by the three nominated by the act, one of whom had died, and whose place had not been filled up at the time the last assessment was made.

Mr. Serjt. *Hullock*, in support of the rule, insisted, that as it was provided by the act, that "all acts, matters, and things, done by any two of the Commissioners, should, to all intents and purposes, be as valid and effectual as if the same were done and performed by all the three Commissioners,"—the two lessors of the plaintiff, as the survivors, were empowered to make the assessment in question; for even if *Litt* had been alive, and objected to the payment of the sums due to the bankers and solicitors, and for which the assessment was made, if the other two had acquiesced in their allowance, such assessment would be valid and binding; but the general award had been signed and executed by the three, previously to the death of *Litt*, and the assessment in 1821 was made for the purpose of defraying the expences of the act, and paying monies due from the surviving Commissioners to their bankers for sums advanced, and to the solicitors, for business done on account of the inclosure. No fund could be created without an assessment for the purpose of paying those demands, and until such fund was raised, no receipts, payments, or vouchers, could be obtained to be laid before and settled by a magistrate; and it follows, from the necessary construction of the act, that two Commissioners were sufficient to make the assessment, and demand payment of the sum of 14*l.* 6*s.* 6*d.* due from

the landlord of the defendants, and assessed on him for the purpose of carrying the act of Parliament into execution.

Mr. Justice PARK (*a*).—The objection raised by my Brother *Taddy*, as to the last assessment being made without a third Commissioner being in existence, appears to me to be unanswerable. The object of the statute was to give concurrent rights to each of the three Commissioners therein named; they must therefore, have all acted in concert. But how could that have been done, if one of them were dead? An act by two only, is contrary to the provisions of the statute, which clearly contemplated such act to be done by the three together. The third Commissioner might by argument or reasoning, have induced the other two to be of his own opinion, in case the items for which the assessment in question was made had been discussed before them all. As therefore I think this point is perfectly clear, it is unnecessary to consider the other objections that have been raised in the course of the argument. Still however, I trust that the Commissioners will be eventually entitled to recover what appears to me to be justly due to them.

Mr. Justice BURROUGH.—I am of the same opinion. By the statute, a power was given to three Commissioners, or two of three; one of the three died, and a third was not appointed at the time the last assessment or demand was made; that therefore, was a suspension of their power. It is essential that there should have been an adjudication by the three, for if the third had been present at the time the assessment was made, he might have exercised a dominion over the conduct of the other two. The survivors must be taken either to have acted as Commissioners or not, and it was necessary, if they are to be considered as such, that the

(*a*) Lord Chief Justice *Dallas* was absent.

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whole three should have joined in making the assessment, and consequently the acts of the two alone are not a compliance with the terms of the statute.

Mr. Justice RICHARDSON.—It appears that the Commissioner appointed on behalf of the freeholders was dead before the accounts relative to passing the act were made out. By the inclosure act in question, three Commissioners were nominated and appointed for setting out and allotting the commons and waste grounds, and were also empowered to make assessments and demands for the purpose of defraying the expences of the inclosure. If the three had met in the present instance, one might have objected to the amount of the solicitor's bill for carrying the act into execution, and for the purpose of defraying which the assessment in question was chiefly made. I therefore concur with my Brothers *Park* and *Burrough*, in saying, that the want of the existence and concurrence of a third Commissioner constitutes a fatal objection to this action, and more particularly so, as the co-extensive existence of the three at one and the same time, was sedulously provided for by the statute.

Rule discharged.

Friday, Feb. 8.

PYTT and Others, Executors, &c. *v.* GRIFFITH.

Where in an action of debt on bond, it was sworn that the deponents had learned that the attesting witness kept out of the way, to avoid an arrest:—Held, that this was not a sufficient reason for dispensing with the attendance of such subscribing witness, to prove the execution of the bond by the obligor, and evidence of his hand-writing having been given *aliunde*, on which the obligee obtained a verdict; the Court ordered a new trial.

IN the last *Easter* Term an action was brought by the plaintiffs, as executors of Mrs. *Chaworth*, against the defendant, upon a bond for 600*l.* executed by him in the year 1811. Plea, *non est factum*. In the last *Trinity* Term, the defendant filed a bill in the Court of Exchequer for an injunc-

tion, on the ground that Mrs. *Chaworth* had with other creditors, agreed to take a conveyance of the defendant's real and personal property, in trust for sale for the payment of their debts equally. A few days before that Court closed for the long vacation, the plaintiffs demurred to the bill, which demurrer is still pending.

The present action however, came on for trial before Mr. Baron *Graham*, at the last *Summer* Assizes at *Bristol*, and was treated as an undefended cause, and upon evidence of the hand-writing of the defendant to the bond, a verdict was found for the plaintiffs without calling the defendant's son, who was the only attesting witness to that instrument, or adducing any part of the hand-writing of the latter.

Mr. Serjt. *Lens*, in the last Term, obtained a rule *nisi*, that this verdict might be set aside and a new trial granted, or a nonsuit entered, on an affidavit of the defendant which disclosed the above circumstances, and stated, that he did not expect that any further proceedings would have been had at law in this action until the bill in equity had been disposed of, and that he did not know that the present cause had been tried, until after the Assizes at *Bristol* had ended, when he was informed that a verdict had been obtained against him. The defendant's son also swore, that he was the only attesting witness to the bond; that before the trial he corresponded with the plaintiffs' attornies upon the subject of this action, and that he was never served with any *subpœna*, or required, either personally or by letter, to attend the trial; that from the time the present action was brought to the time of making this application, he had been within the jurisdiction of this Court, and that if a *subpœna* had been delivered to him, or left at his office, he would have attended such trial. Under these circumstances, the learned Serjeant contended, that there must be a new trial, as it was absolutely necessary that the attesting witness should have been called, unless his absence could have been most satisfactorily accounted for.

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Mr. Serjt. *Pell* now shewed cause on affidavits which stated, that enquiries had been made for the defendant's son at his office in *London*, for the purpose of subpœnaing him, but that he was not to be found there, and that the persons making such enquiries had heard that he was keeping out of the way to avoid an arrest. The learned Serjeant therefore submitted, that the execution of the bond might be proved *aliunde*, as in a case where an attesting witness is dead or absent, so as not to be amenable to process, or where he cannot be found after a strict and diligent enquiry has been made, and here, as it was sworn that the defendant's son kept out of the way to avoid an arrest, it was enough to shew that he could not be found, or that he absented himself at the instance of the defendant, so as to entitle the plaintiffs to prove the execution of the instrument, without calling the attesting witness, or at all events it would have been sufficient to have proved his hand-writing at the trial.

Mr. Serjt. *Lens*, in support of the rule. The facts disclosed by the affidavits for the plaintiffs are no answer in law to dispense with the attendance and testimony of the defendant's son at the trial; for it is not positively sworn that he kept out of the way at the request of the defendant, or that he was out of the jurisdiction of the Court, so as not to be amenable to its process at the time of such trial. In *Prince* v. *Blackburn* (*a*), it was held, that evidence of the hand-writing of a subscribing witness cannot be dispensed with, unless he is out of the jurisdiction of the Court; and that rule has never been relaxed:—if it were otherwise, advantage might be taken of the temporary absence of a subscribing witness, to sue upon instruments which might be void and illegal, if the witness were examined in person. Here, it appears that the defendant's son was the only attesting witness to the bond, and that he had corresponded with the plaintiffs' attornies until a short time before the trial, and that he had never been subpœnaed by them. He might therefore have supposed that the present action was postponed

(*a*) 2 East, 250.

to abide the result of the bill in the Exchequer, and consequently his testimony ought not to have been dispensed with at the trial.

Mr. Justice PARK (*a*).—I think there must have been some mistake at the trial of this cause; it is therefore proper that it should go down again. The general rule applicable to cases of this description must be strictly followed, *viz.* that an attesting witness must be called to prove the execution of a deed, or his absence must be well accounted for. Formerly, proof of the hand-writing of an attesting witness was only admissible where such witnes was dead; and I can remember the first deviation from that rule, where it was extended to cases where the party was abroad, or out of the jurisdiction of the Courts of this country; but I have never known an instance where his testimony has been dispensed with, to prove the execution of a deed, on an affidavit which merely stated, that it was believed he kept out of the way in order to avoid an arrest. But it has been contended, that proof of his hand-writing was admissible, if he kept out of the way at the instance of the defendant in the suit. It is manifest however, on the face of the affidavits, that if he kept out of the way, it was on account of his own pecuniary distress and difficulties. I therefore think there should be a new trial.

Mr. Justice BURROUGH.—It is quite clear that an attesting witness must be called to prove the execution of a deed, unless he be out of the jurisdiction of the Court, or kept out of the way at the instance of the defendant, or party charged in the suit.

Mr. Justice RICHARDSON.—In *Doe*, d. *Johnson* v. *Johnson* (*b*), Lord *Ellenborough* is reported to have said,

(*a*) Lord Chief Justice *Dallas* was absent.

(*b*) Phillips on Evidence, 5th edit. vol. i. 472, n., where it is added, that "It is not possible by any general rule, to ascertain precisely in what cases proof of the subscribing witness's hand-writing will be admitted. Each case must depend upon its own peculiar circumstances. But in all cases it ought to be satisfactorily proved, that a reasonable, honest, and diligent enquiry has been made, without any evasion, and without any design to overlook the witness."

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"The proof of the fact of a subscribing witness's going abroad twenty years ago, (so large a portion of the life of man,) and never having been heard of since, would of itself be sufficient to admit proof of his hand-writing."

Rule absolute, for a new trial (*a*).

(*a*) But see *Crosby* v. *Percy*, 1 Taunt. 364. *Burt* v. *Walker*, 4 Barn. & Ald. 697.

Saturday, Feb. 9.

RICHARD HENRY TOLSON, Esq. Demandant; KAYE, M. D. Defendant.

The twenty years within which a *formedon in descender* must be brought under the statute 21 *Jac.* 1. *c.* 16. *s.* 1. begin to run when the title descends to the first heir in tail, and there is no distinction between the heir of a tenant in fee taking by descent, and the heir of a tenant in tail.

THIS was a writ of formedon in the descender, by which the demandant, in *Michaelmas* Term, 1 *Geo.* 4, demanded of the defendant certain messuages, dwelling-houses, and land with the appurtenances, situate in the parish of *Wath-upon-Derne*, in the county of *York*, which *Richard Tolson*, Esq. and *Henry Tolson*, eldest son of the said *Richard Tolson*, gave to the said *Henry Tolson*, and to the heirs male of his body begotten on the body of *Frances* his wife; and which, after the death of the said *Henry Tolson* and of *Henry Tolson*, son and heir of the said *Henry*, on the body of *Frances* his wife begotten, and of *Henry Tolson*, son and heir of the said *Henry*, son of *Henry* and *Frances*, and of *William Tolson*, brother of the said *Henry*, and of *Richard Tolson*, son and heir of the said *William*, to *Richard Henry Tolson*, the demandant, son and heir of the said *Richard*, according to the form of the gift aforesaid, ought to descend:—And whereupon the said *Richard Henry Tolson* says, that the said first named *Richard Tolson* and *Henry Tolson* were seised of the tenements aforesaid, with the appurtenances, in their demesne as of fee and right in the time of peace, in the time of the late Lord *Charles* the Second, King of *England*, by taking the esplees thereof, to the

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value of 10*l.* and being so seised thereof, the said first-named *Richard Tolson* and *Henry Tolson*, afterwards, to wit, on the 18th *June*, in the 24th year of the reign of the said Lord *Charles* the Second, gave, granted, enfeoffed, and confirmed unto one *John Mollineux*, one *Daniel Fleming*, one *Richard Eaglesfield*, one *Wilfred Lawson*, one *Myles Pennington*, and one *Andrew Huddleston*, and their heirs, and to the survivor and survivors of them, and his and their heirs, amongst other things, the tenements aforesaid, with the appurtenances, to hold to them for ever; to the use of the said first-named *Richard Tolson* and *Ann* his then wife, and their assignee and assignees, for and during the term of their lives and the life of the longer liver of them; and after the death of the survivor of them, to the use of the said first-named *Henry Tolson*, and the heirs male of his body, begotten or to be begotten upon the body of *Frances* his then wife, with divers remainders over; with the ultimate remainder to the use of the right heirs of the said first-named *Richard Tolson* for ever; by virtue of which gift, and by force of the statute for transferring uses into possession, the said first-named *Richard Tolson* and *Anne* his wife, became and were seised of the said tenements, with their appurtenances, in their demesne as of freehold, to wit, for the term of their lives, and the life of the longer liver of them, in the time of peace, in the time of the said lord *Charles* the Second, by taking the esplees thereof to the value of 10*l.*; and being so seised thereof, the said first-named *Richard Tolson*, on the 2d *July*, 1689, died, leaving the said *Anne* his wife him surviving; and the said *Anne*, on the 27th *March*, 1714, died, leaving the said first-named *Henry Tolson* her surviving; who thereupon, by virtue of the said gift, and by force of the statute for transferring uses into possession, became and was seised of the said tenements, with the appurtenances, in his demesne as of fee-tail, (to wit, to him and the heirs male of his body upon the body of the said *Frances* his wife begotten, or to be begotten), in the time

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of peace, in the time of the lady *Anne*, late Queen of *England*, by taking the esplees thereof to the value of 10*l.*; and the said first-named *Henry Tolson*, on the 27th *September*, 1724, died, leaving *Henry Tolson*, his son and heir male of his body on the body of the said *Frances* his wife begotten, him surviving; whereupon the right to the said tenements, with the appurtenances, descended from the said first-named *Henry Tolson* to the said *Henry Tolson* his son, as tenant in tail male, according to the form of the gift aforesaid; and the said last named *Henry Tolson* on the 10th *September*, 1729, died, leaving *Henry Tolson* his eldest son and heir of his body lawfully begotten, and *William Tolson* his second son, lawfully begotten, him surviving; whereupon the right to the said tenements, with the appurtenances, descended to the said last-named *Henry Tolson*, as tenant in tail male, according to the form of the gift aforesaid; and the said last-named *Henry Tolson*, on the 2d *February*, 1763, died, without issue male of his body lawfully begotten, leaving *Richard Tolson*, son and heir of the body of the said *William Tolson*, lawfully begotten, him surviving, (the said *William Tolson* having died in the life-time of the said last-named *Henry Tolson*, on the 30th *September*, 1748); whereupon the said *Richard Tolson*, as heir male of the said *Henry Tolson* his grand-father, after the death of the said *Henry Tolson* his uncle, the right to the said tenements, with the appurtenances, descended as tenant in tail male, according to the form of the gift aforesaid; and the said last-named *Richard Tolson*, on the 23d *June*, 1815, died, leaving the said *Richard Henry Tolson*, the now demandant, his only son and heir of his body lawfully begotten, him surviving; whereupon the right to the said tenements, with the appurtenances, descended to and now remaineth, and ought to remain in the said *Richard Henry Tolson*, the demandant, according to the form of the gift aforesaid; for that the said first-named *Henry Tolson* died, leaving the said *Henry Tolson*, the son and heir male of his body on the body of the said *Frances* his wife begotten, him surviving: and for that

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the said last-named *Henry Tolson* died, leaving the said *Henry Tolson*, the son and heir of his body lawfully begotten, him surviving; and for that the said last-named *Henry Tolson* died without issue male of his body lawfully begotten; and for that the said *William Tolson* died in the life-time of the said *Henry Tolson*, leaving the said *Richard Tolson*, the son and heir of his body lawfully begotten; and for that the said last-named *Richard Tolson* died, leaving the said *Richard Henry Tolson*, the now demandant, the son and heir of his body lawfully begotten, him surviving; and therefore he brings suit, &c.

The defendant pleaded thirty-two pleas, on the first twenty-four of which issues were joined. The twenty-fifth plea alleged, that the supposed title and cause of action, (if any), to and for the tenements aforesaid, with the appurtenances, above demanded, did not first descend or fall, by force of the supposed gift aforesaid, within twenty years next before the suing out of the original writ of the demandant in this behalf. The twenty-sixth plea alleged, that the supposed title and cause of action, (if any), to and for the tenements aforesaid, with the appurtenances above demanded, did first descend more than twenty years before the suing out of the said original writ of the demandant. The twenty-seventh plea alleged, that the first-named *Henry Tolson*, more than twenty years before the suing out the original writ of the demandant against the defendant herein, to wit, on the 27th *September*, 1724, died, upon whose decease the supposed title and cause of action, (if any), to and for the tenements aforesaid, with the appurtenances above demanded, by force of the supposed gift in the count mentioned, immediately devolved upon and fell to the said *Henry Tolson* his son, as in the count alleged; and that the said last-mentioned *Henry Tolson* did not, upon or after the death of the said first-named *Henry Tolson*, ever enter into the tenements aforesaid, with the appurtenances above demanded, by force of the supposed gift aforesaid, upon or after the death of the said first-named *Henry Tolson*; and that the said supposed title and

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cause of action, (if any), to and for the tenements aforesaid, with the appurtenances above demanded, did not first fall to the said *Henry Tolson*, the son of the said first-named *Henry Tolson*, by force of the supposed gift aforesaid, upon or after the death of the said first-named *Henry Tolson*, within twenty years next before the suing out of the original writ of the demandant in this behalf. The twenty-eighth plea alleged, that *Henry Tolson*, the son of the first-named *Henry Tolson*, died more than twenty years before the suing out of the original writ, upon whose decease the title to the tenements aforesaid, by force of the supposed gift in the count mentioned, devolved upon and fell to *Henry Tolson* his son; and that the latter did not thereupon enter into the tenements aforesaid; and that the title thereto, above demanded, did not first fall to the said *Henry Tolson*, the son of the said *Henry Tolson*, the son of the said first-named *Henry Tolson*, within twenty years next before the suing out of the original writ of the demandant. The twenty-ninth plea alleged, that *Henry Tolson*, the son of the said *Henry Tolson*, the son of the said first-named *Henry Tolson*, died more than twenty years before the suing out of the original writ of the demandant, without any heirs male of his body lawfully issuing; whereupon the supposed title and cause of action, (if any), to the said tenements, by force of the gift aforesaid, devolved upon and fell to *Richard Tolson*, the eldest son and heir of *William Tolson*, then deceased, the second son of *Henry Tolson*, the son of the first-named *Henry Tolson*, as heir male of his the said *Richard Tolson*'s grand-father, after the death of his said uncle the said *Henry Tolson*, the son of the said *Henry Tolson*, the son of the said first-named *Henry Tolson*; and that the said *Richard Tolson*, the son and heir of the said *William Tolson*, the second son of *Henry Tolson*, the son of the first-named *Henry Tolson*, did not, upon or after the death of the said *Henry Tolson*, his uncle, ever enter into the tenements by force of the gift aforesaid; and that the said supposed title and cause of action, (if any), to

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the tenements aforesaid, did not first fall to the said *Richard Tolson*, the son and heir of the said *William Tolson*, the second son of the said *Henry Tolson*, the son of the first-named *Henry Tolson*, within twenty years next before the suing out of the original writ of the demandant. The thirtieth plea alleged, that though true it is that the right to the tenements did descend from the first-named *Henry Tolson* to the said *Henry Tolson* the son, as tenant in tail male; nevertheless for a plea in this behalf, the defendant averred, that the said last-named *Henry Tolson* was not seised in his demesne as of fee-tail, by taking the esplees of the tenements aforesaid within twenty years next after his right to the same first descended. The thirty-first plea alleged, that though true it is that the right to the tenements did descend from the last-named *Henry Tolson* to said *Henry Tolson* his son, as tenant in tail male; nevertheless for a plea in this behalf, the defendant averred, that the said last-named *Henry Tolson* was not seised in his demesne as of fee-tail of the said tenements by taking the esplees thereof within twenty years next after his right thereto first descended. The thirty-second plea was similar, in terms, to the thirtieth and thirty-first, alleging, that though true it is, that the right to the said tenements did descend to the said *Richard Tolson* as heir male of his grand-father *Henry* after the death of his uncle *Henry Tolson*, as tenant in tail male, yet that the said *Richard Tolson* was not seised in fee-tail by taking the esplees within twenty years next after his right first descended.—The demandant, in his replication to the twenty-fifth plea, after protesting that the same was insufficient in law, and that he was not bound to answer the same; nevertheless, for replication in this behalf alleged, that on the 23d *June*, 1815, *Richard Tolson*, the father of the demandant, died, leaving the latter his only son and heir, him surviving; whereupon the right to the tenements above demanded, did first descend and fall to him within the space of twenty years next before the suing out of his original writ. There was a similar repli-

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cation to the twenty-sixth plea. The replications to the twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, and thirty-second stated a descent upon the demandant within twenty years next before the suing out of his original writ. The defendant demurred generally to the replications to all those pleas, and the demandant joined in demurrer.

The cause now came on for argument, when

Mr. Serjt. *Hullock* in support of the demurrer, submitted, that although the replications to those pleas were argumentative, and did not expressly deny or put in issue the allegations contained in them, still, that the question raised by the demurrer, depended on the construction to be put upon the statute of Limitations, 21 *Jac.* 1. *c.* 16. *s.* 1, *viz.* whether after a right of entry has once accrued to issue in tail and he omits to assert his right, and make an entry within twenty years, each succeediug tenant in tail has a like period within which he may bring his *formedon* after the descent cast upon him; or in other terms, whether upon the death of a preceding tenant in tail, a new title and cause of action first descends to the succeeding tenant in tail, as issue of the original donee, so as to bring him within the letter of the statute. There is no case precisely in point; but the decisions on the statute of Fines (*a*) appear to bear a strong analogy to the present, from which it must be inferred, that the time under the statute of *James*, within which a *formedon in descender* ought to be commenced, begins to run, when the title descends to the first heir in tail. This will depend chiefly upon the language of the statute itself. Before it was passed, there was an infinity of statutes as to when a right of entry was barred by discontinuance, fine, or non-claim; but the express object of the statute in question was for the quieting of mens estates, and avoiding of suits; and by the first section it is enacted, that "all writs of

(*a*) 4 *Hen.* 7. *c.* 24.

formedon in descender, remainder or *reverter* of any lands to be sued or brought by means of any title or cause thereafter happening, shall be sued or taken within twenty years next after the title or cause of action *first* descended or fallen." By these words it is quite clear that the title of an estate-tail *first* descends or falls on the first heir in tail, who in this case was *Henry Tolson* the first issue in tail, and whose title accrued in the year 1724. If therefore, the first issue male does not enter within twenty years next after his right shall accrue, he and his issue are for ever barred by the statute; for by the latter part of the first section, it is enjoined, that "no person shall make any entry into any lands, &c. but within twenty years next after his right or title shall *first* descend or accrue; and that in default thereof, such person so not entering, and his heirs, shall be utterly disabled from such entry." It was the intention of the Legislature to confer a right on the first heir in tail only, for if each succeeding heir was to be allowed the period of twenty years and have a fresh right of entry, the object of the statute would be completely defeated, for new claimants might arise, although a party might have been in an uninterrupted possession for centuries. The second section of the statute applies only to the disabilities of the first heir, to whom the title may accrue, and is inapplicable to the present case, as it does not appear that *Henry Tolson*, the first heir in tail, was incapacitated from taking the estate in question. With respect to authorities, the case of *Doe*, d. *George* v. *Jesson* (*a*), appears to be in favor of the defendant, where in an action of ejectment, it appeared that the ancestor died seised, leaving a son and daughter infants, and on the death of the ancestor a stranger entered, and the son soon after went to sea, and was supposed to have died abroad, under age; it was held, that the daughter was not entitled to twenty years to make her entry after the death of her brother, but only to ten years, more than twenty years having in the whole elapsed, since

(*a*) 6 East, 80.

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the death of the person last seised; and although the question there turned on the second section of the statute of *James*, yet Lord *Ellenborough* said (*a*), "the time allowed by that statute for making an entry might be indefinitely extended if the construction contended for by the plaintiff were to be admitted. There is no calculating how far it might be carried by parents and children dying under age, or continuing under other disabilities in succession. The word 'death' in that clause, must mean and refer to the death of the person to whom the right first accrued, and whose heir the claimant is; and the statute meant that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability, (notwithstanding the twenty years from the first accruing of the title to the ancestor, should have before expired.)" These observations are particularly applicable to the present question; and in *Cotterell* v. *Dutton* (*b*), it was determined, that when once the statute has began to run, nothing stops it; as where a tenant in tail left issue in tail two sons, infants, and the eldest having attained twenty-one, died without issue, it was held that the statute continued to run against his brother, although a minor; and it having been suggested in the course of the argument in that case, that the nature of an estate-tail was distinguishable from another estate,—Mr. Justice *Heath* observed (*c*), "there is no such difference between the issue in tail and other heirs, as is supposed;" and Mr. Justice *Chambre* added, "the ten years do not run at all while there is a continuance of disabilities, but they run without intermission from the time that the disabilities first cease;" and in *Doe*, d. *Duroure* v. *Jones* (*d*), it was decided, that when once the five years allowed to an infant to make an entry for the purpose of avoiding a fine, begin,

(*a*) 6 East, 84. —(*b*) 4 Taunt, 826.—(*c*) Id. 830.—(*d*) 4 Term Rep. 300.

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the time continues to run, notwithstanding any subsequent disability; and Lord *Kenyon* there said (*a*), "he never heard it doubted, till the discussion of that case, whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their running, and if the disability would have such an operation on the construction of one of those statutes, it would also on the others." The universality of that principle therefore, is directly applicable to the present case, and the defendant's pleas are a complete answer to the demandant's right of action, as his title has not descended to him within the space of twenty years next before the suing out of his original writ.

Mr. Serjt. *Vaughan, contrà.*—The simple question is, when did the demandant's title first descend or accrue to him:—or in other terms, did it in construction of law, descend to him on the death of the donee, when the title of the first tenant in tail accrued, or on the death of the demandant's father, who died within the last six years? This will depend, first on the construction of the statute; secondly, on the peculiar nature of the estate; and thirdly, by analogy to decided cases; for there is no authority directly in point. In *Cruise's Digest* (*b*) it is said, that "it has never been determined, whether under the statute 21 *Jac.* 1. *c.* 16. *s.* 1, a person claiming an estate-tail by descent, is barred by the neglect of the preceding person entitled to the estate-tail in not making an entry or bringing a writ of *formedon* within twenty years from the time his title accrued." [Lord Chief Justice *Dallas.*—But it is there said (*c*), that the general opinion is, that in consequence of the words *first descended*, if a person entitled to an estate-tail, neglects to bring his writ of *formedon* within twenty years after his title first descends, he and also his issue, will be barred, for if the issue brings a *formedon*, it may be answered, that the title first descended to his predecessor upwards of twenty years

(*a*) 4 Term Rep. 310.——(*b*) Vol. iii. 2d edit. 481.——(*c*) Id. 482.

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before, and that this construction was confirmed by the opinion of the majority of the Judges in the case of *Stowel* v. *Lord Zouch* (*a*).] The demandant is not barred by the statute from bringing this action on principle. Issue in tail do not take in the character of heir to their immediate predecessor, but as issue of the body of the first donee. Such issue therefore take *per formam doni*, and have a new, distinct, substantive and paramount title, and are therefore not affected by any acts or laches of their ancestors. They consequently take by purchase rather than by descent, or at all events, take partly *per formam doni*, and partly by descent. Here therefore, the demandant has a paramount title, not dependant on the acts of his predecessors, but as the heir in tail of the donee. The statute of *James* being in restraint and abridgment of the common law, must be construed strictly, as was the previous statute of the 32 *Hen.* 8. *c.* 2, by the fifth section of which it was enacted, that "all *formedons in reverter* or *remainder* shall be sued and taken within fifty years next after the title and cause of action fallen;" and in *Whitton* v. *Crompton* (*b*), it was held, that a *formedon in descender* was not within that statute, as it was an action possessory, and not a writ of right, nor did it come within the nature of such a *formedon* as was comprised in the statute. The same rule is laid down in *Bacon's Abridgment* (*c*), *viz.* that that statute does not extend to a *formedon in descender*. So in *Brook's Readings* on the same statute (*d*), where an heir in tail, who was within age at the time of the statute, brought a writ of right after ascension, &c. upon the ancient limitation, and within the six years, and he and the tenant joined the mise upon the mere *droit*, and after the demandant made default, by which judgment final was given, and he died within the six years;—it was said that the heir should have an action within other six years, notwithstanding this judgment, for that he should have a *formedon*, because

(*a*) 1 Plow. 374.——(*b*) Dyer, 278.——(*c*) Tit. Limitation of Actions, (B.)——(*d*) Page 133.

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the default was the act of the father, which should not prejudice the issue in tail by the statute of *Westminster* the second. That was determined on the ninth section of the statute 32 *Hen.* 8. *c.* 2. bywhich it was provided, that "if infants or *feme coverts* died during their minority or coverture, and no determination or judgment were had of such titles, actions, or rights which had accrued to them; then that their next heir should have the like liberty and advantage to sue within six years next after the death of the ancestor, as such ancestor might have had within the six years;" and the statute of *James* being in *pari materiâ*, must receive an equally strict construction. [Mr. Justice *Burrough*.—*Brook's Readings* were merely a course of lectures, and he does not cite any authority in support of that case; besides, it is there stated that an heir in tail brought a writ of right; if he did so, it was in his own default, for such writ applies only to an estate in fee; and it appears to me, that he cannot bring a writ of *formedon* if there has been a discontinuance more than twenty years from the time the title descended to the first heir in tail.] The word "heirs" is not introduced in the second clause of the first section of the statute of *James*, which relates to writs of *formedon*, and which alone provides as to the time within which persons shall make an entry into lands, after their title shall have first accrued; from whence it may be presumed, that the statute did not intend to bar such heirs. The nature of an estate of an heir in tail therefore, as far as regards a writ of *formedon*, is altogether different from that of an heir claiming under his ancestor; and the distinction is thus laid down in *Ratcliff's case* (*a*). "If a man makes a gift to one and the heirs of his body, and he hath issue a son and a daughter by one *venter*, and a son by another *venter*, and the father dies, and the elder son enters and dies, the younger son shall inherit *per formam doni*, for he claims as heir of the body of the donee, and not generally as heir to his brother;" and in *Machell* v.

(*a*) 3 Rep. 41, b.

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Clarke (*a*), it is laid down, that "the reason why an estate made by tenant in tail to commence after his death is void, is because then the issue has a right paramount *per formam doni*." The same principle was established in *Hinton* v. *Hinton* (*b*), where the question was, whether an agreement could be carried into execution against issue in tail, or remainder claiming *per formam doni*: and Lord *Hardwicke* there said (*c*), "If a man, seised of an estate-tail, with or without remainder over, contracts for sale, and receives the purchase-money, and dies in the first case without levying a fine, or without a recovery in the last case, the Court would not carry an agreement into execution against the issue in tail; as was the case of Mr. *Savil* of *Medley*, who when tenant in tail, chose rather to live in gaol and be served on plate there, than to perform his agreement; but the ground of that is, that the issue in tail in the one case, or the remainder-man in the other, claim *per formam doni* from the creator or author of the estate-tail; and therefore, though in the power of tenant in tail to be barred by a particular conveyance, that not being done, the Court cannot take away that right they derive, not from the tenant in tail, but from the author." The effect of the construction to be put on the statute of *James*, as contended for by the defendant, would be to work the same mischief that might be effected by passing a fine or suffering a recovery; and in case of a decree against tenant in tail to levy a fine, who dies before he has performed the decree, the issue is not bound, because he claims paramount the tenant in tail, and *per formam doni*. *Frederick* v. *Frederick* (*d*). So here, the issue is not to suffer on account of the neglect or default of his predecessors. The doctrine laid down in the case of *Doe*, d. *George* v. *Jesson*, is founded neither on reason nor principle, *viz.* that the daughter, whose brother had died a minor before entry, after the ancestor's death, was entitled to ten years only for the purpose

(*a*) 2 Ld. Raym. 781. —— (*b*) 2 Ves. ben. 631. —— (*c*) Id. 634. —— (*d*) 1 Peere Wms. 721.

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of bringing her ejectment from the time of her brother's decease, the ancestor having been dead more than twenty years in the whole; and the Court of King's Bench, without hearing argument in support of the rule for setting aside the verdict, merely decided that there should be a new trial. That decision however, was afterwards impeached, if not expressly over-ruled, in the House of Lords (*a*). In *Cotterell* v. *Dutton*, the demandant did not bring his writ of *formedon* until fourteen years after he became of age, although more than twenty years had elapsed after the title had first descended to him; besides, that case, as well as *Doe*, d. *George* v. *Jesson*, depended on the construction of the second section of the statute of *James*, as the first heir in tail laid under a disability. This case therefore is distinguishable, as it turns entirely on the construction of the first section of that statute. The case of *Stowel* v. *Lord Zouch* (*b*) is inapplicable to the present, as the only point there raised was on the meaning of the words contained in the statute of Fines, 4 *Hen.* 7. *c.* 24, where a difficulty had arisen from that of "death" not having been introduced therein. Besides, fines levied under that statute conclude as well privies as strangers; and the word "first" is not mentioned therein with reference to the time of bringing the action. On the construction of all the statutes therefore, and more particularly on that of *Westminster* the second, as well as on the peculiar nature of the estate of the demandant, he is entitled to the indulgence of the Court, and more particularly so, as his title did not descend or accrue to him until the death of his father in 1815, and he had twenty years from that time within which he might bring his writ of *formedon*, as he was not to be prejudiced by the neglect or default of his ancestors.

(*a*) Mr. Serjt. *Bosanquet*, *amicus curiæ* observed, that a case of *Doe*, d. *Wright* v. *Jesson*, was argued in the King's Bench, as to the construction of the word "heirs" in a will, and that the decision of that Court was afterwards over-ruled in the House of Lords; but that it did not embrace any point similar to that raised in the case of *Doe*, d. *George* v. *Jesson*. See 5 Maule & Selw. 95. 5 Barn. & Ald. 468.

(*b*) 1 Plow. 353.

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Mr. Serjt. *Hullock*, in reply. The decision in the case of *Doe*, d. *George* v. *Jesson*, has never been impeached, and the subsequent case of *Doe*, d. *Wright* v. *Jesson*, turned entirely upon the construction of a devise, *viz.* whether a devisee and his children, who were born after the death of the testator, took an estate in tail or for life. Although it has been stated that the question embraced in this case has never been determined, and *Cruise's* Digest has been referred to in support of that position, still that learned author proceeded to observe, that the general opinion is, that in consequence of the words "first descended," if a person entitled to an estate tail, neglect to bring his writ of *formedon* within twenty years after his title first descends, he and also his issue will be barred. It has been said too, that issue in tail take an estate by purchase rather than by descent; but if a tenancy in tail can in any instance be deemed *quasi* an estate by purchase, the rule in *Shelley's* case (*a*), falls to the ground. The argument sought to be derived from the statute of the 32 *Hen.* 8. is not sufficient to answer the purposes for which it was applied; for the statute 21 *Jac.* 1, was passed for the express purpose of the quieting men's estates and avoiding of suits, as the preceding statute of *Hen.* 8. was found to be insufficient for that purpose. In *Brook's Readings* on the latter statute it is stated, that an heir in tail brought a writ of right, in which he and the tenant joined the mise upon the mere *droit*. That writ therefore was improperly brought; or enough is not stated to render the position there laid down an authority. In *Hinton* v. *Hinton* it was decided, that an estate tail could only be barred by fine or recovery; and that an heir in tail could not be compelled to complete a recovery which his ancestor had undertaken to suffer, as it would operate as a new mode of barring estates tail. It has been insisted that the statute of *James* must be construed strictly, but this would be not only in direct contradiction to the intent of the legislature, but the uniform language of the Judges, and more particularly so from that of Lord

(*a*) 1 Rep. 104 (a).

Kenyon, who was clearly of opinion that the statutes of Limitation should be liberally construed. The only cases expressly applicable to the present question, are those of *Doe*, d. *George* v. *Jesson*, and *Cotterell* v. *Dutton*. The third saving in the statute 4 *Hen.* 7. *c.* 24, is stronger than that in the statute 21 *Jac.* 1, as it extends to strangers who are not parties or privies to the fine; yet in *Penyston* v. *Lyster* (*a*), it was held, that if tenant in tail be disseised, and the disseisor levies a fine, and the tenant in tail suffers five years to pass without claim, and afterwards dies, the issue in tail is barred, for the tenant in tail had a right at the time of the fine levied, and therefore that the issue was not within the saving of the former statute; and in the statute of *James*, the word "first" is introduced, which is not to be found in that of fines; and in *Stowel* v. *Lord Zouch*, it was expressly decided, that if a person to whom a right of entry first accrues, dies before the expiration of the five years, and such right descends to his son, or heir at law, who is then under age, or labours under any of the other disabilities mentioned in the statute 4 *Hen.* 7. 24. such son or heir must pursue his right, within the five years, which began to run in the time of his ancestor, otherwise he will be barred: and in *Doe*, d. *Duroure* v. *Jones* it was decided, that if once the statute begins to run, it continues to do so, notwithstanding any subsequent disability; and in the late case of *Murray* v. *The East India Company* (*b*), Lord Chief Justice *Abbott*, in delivering the judgment of the Court, said, "The several statutes of Limitation being all in *pari materiâ*, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same. The words of the first section of 21 *Jac.* 1. *c.* 16, as it regards entry into lands are, 'that no person or persons shall make entry into any lands, &c. but within twenty years next after his or their right or title which shall thereafter first descend or accrue to the same.' Other slight variations of expression may be found in other parts of this,

(*a*) Cro. Eliz. 896. See also 3 Rep. 87 (b).——(*b*) 5 Barn. & Ald. 215.

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and the statute 32 *Hen.* 8. *c.* 2. but it is not necessary to particularise them; the object of both manifestly being to limit the time of entry or suit to a person in *esse*, capable of entering or suing, and nothing more." Here, *Henry Tolson*, the first heir in tail, was not only in *esse*, but nothing incapacitated him from entering in the year 1724. His right and title then accrued to him, and it has been admitted on the face of the record, that no right whatever accrued to the present demandant, until the death of his father, in the year 1815. On these grounds therefore, the defendant is entitled to judgment.

Lord Chief Justice DALLAS.—I am of opinion that in this case, the statute 21 *Jac.* 1. *c.* 16, begins to run when the title or cause of action first falls or accrues; and I shall follow the course adopted by my Brother *Vaughan*, and shew the reasons on which such opinion is founded. First, on the words of the statute, and its construction. Secondly, on the nature of the estate; and lastly, if necessary, on the authority of decided cases, one of which appears to me to be in substance, although not in circumstances, applicable to the present, *viz.* that of *Cotterell* v. *Dutton*. In the first place, I cannot agree with the position, that statutes of this description ought to receive a strict construction; on the contrary, I think they ought to be beneficially expounded, as they were passed for the purpose of supplanting the mischief or evil which before existed, and applying a remedy thereto; and this appears to me to be expressly pointed out or recorded, by the very first words of the statute, which are "For the quieting of men's estates, and avoiding of suits." In construing this statute, as well as others of a like description, they must be considered, as they were emphatically termed by Lord *Kenyon*, as statutes of repose, and this has since been adopted as the governing principle by which the Courts were to be guided as to such construction. First then, the words of the statute as applicable to this question are, "That all writs of *formedon in descender*, *remainder* and *reverter*, of or for any manors, lands, or other

hereditaments whatsoever, at any time thereafter to be sued or brought by means of any title or cause thereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years." When then did the title or cause of action first descend or fall in the present case? It descended, in the first instance, on the first tenant in tail, who suffered more than twenty years to elapse without making any entry, or taking any steps whatever to assert his right. Following the words of the statute further; are those claiming under him, or his heirs barred by his neglect, under the words "*first descended or fallen?*" It appears to me, that for this purpose, it is only necessary to advert to the latter words of that clause, which enact, that "no person or persons should, at any time thereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which should thereafter first descend or accrue to the same; and that in default thereof, such persons so not entering, *and their heirs*, should be utterly excluded and disabled from such entry after to be made." On this statute therefore, the object of which was to quiet the possession of men's estates, is it falling in with the purpose for which it was passed, and which provides for the party who shall first make claim;—to say, that after a lapse of a century, or any greater distance of time, it shall be competent for the issue in tail to set up a claim of this description? It has been admitted, that no line can be drawn as to the number of years within which such claim might be made. If this were allowed, instead of the statute's being for the quieting of men's estates, it would produce the contrary effect, and tend to disturb the possession of all real property. As well therefore, on sense and reason, as with reference to the object for which the statute was passed, it appears to me to be clear, that on the construction of it, a writ of this description must be sued out within twenty years next after the title first descended, and as that was not

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done by the first heir in tail, his heirs are thereby concluded. With respect to authorities, I shall refer, in the first place, to the case of *Doe*, d. *George* v. *Jesson* (*a*), not as governing the present, as it is mainly distinguishable in circumstances, but for the language adopted by Lord *Ellenborough*, in delivering his judgment. His Lordship there said (*b*), "The time allowed by the statute for making an entry, might be indefinitely extended, if the construction contended for by the plaintiff were to be admitted. There is no calculating how far it might be carried by parents and children dying under age, or continuing under other disabilities in succession;" and then applying himself to the construction of statutes of this description, he further said, "The word 'death,' in the second section of the 21 *Jac.* 1. *c.* 16, must mean and refer to the death of the person to whom the right first accrued, and whose heir the claimant was; and the statute meant that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability, (notwithstanding the twenty years from the first accruing of the title to the ancestor should have before expired.") That language was afterwards adopted by Mr. Justice *Lawrence*, and assented to by Mr. Justice *Grose* and Mr. Justice *Le Blanc*, and it must be therefore considered as an authority. Still however, it has been said, in this case, that there is a wide distinction to be drawn between the heir of a person seised in fee, and the heir of a donee in tail, because the latter takes *per formam doni*. That distinction was not only adverted to, but expressly taken by my Brother *Lens*, in the case of *Cotterell* v. *Dutton*, but was repudiated by Mr. Justice *Heath*, who observed (*c*), "There is no such difference between the issue in tail, and other heirs, as was supposed;" and Mr. Justice *Chambre* added, "The ten years do not run at all while there is a continuance of disabilities, but they do so

(*a*) 6 East, 80. ——(*b*) Id. 84. ——(*c*) 4 Taunt 830.

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without intermission, from the time the disabilities first cease;" and Mr. Justice *Gibbs* added, "When once the statute begins to run, nothing stops it." That case therefore appears to me to be expressly in point to shew, that the statute runs from the time when the title or cause of action first descends or falls. I am therefore of opinion, as well on the precise words of the statute, and the liberal construction it ought to receive, as on reason and justice, and the opinion of this Court in *Cotterell* v. *Dutton*, that in this case there must be judgment for the defendant.

Mr. Justice PARK.—It has been the general rule for Courts of justice in this country, to endeavour to put an end to litigation, and particularly to give repose to the possession of landed property; and the question in this case is, whether we shall not give the best effect to this statute, by concurring with my Lord Chief Justice, in holding that the term therein specified begins to run from the period when the title first descends or falls. It has been urged for the demandant, that he is entitled to the particular indulgence of the Court, but I think quite otherwise, and that if any indulgent consideration could be shewn, it should be given to the defendant, for otherwise, who could be said to be in the quiet possession of an estate? Unless the time limited by the statute be observed, a person may be reduced to poverty, after a long and undisputed possession. Here, ninety-eight years have elapsed since the first heir in tail was entitled to claim, and to whom the title then accrued. He at that time laboured under no disability, nor did his heirs after him. The present demandant therefore, should point out with clearness and perspicuity, that he was within the meaning of the statute; and it has been admitted, that he might make a claim of this nature, although five hundred years might have elapsed, on account of the peculiar nature of his estate. I fully agree with my Lord Chief Justice, as to the observations made by him on the construction of the statute of *James*, and it appears to me, that the preamble to that statute alone is

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decisive of this question. It was passed for the purposes of avoiding suits in law and quieting men's estates, and how could this be done if the argument for the demandant were to prevail? Although no case is expressly applicable to the present; that of *Cotterell* v. *Dutton* approaches very nearly to it. There, a tenant in tail died, leaving issue in tail a grand-daughter a *feme covert*; she died *covert*, leaving issue in tail two sons infants, the eldest of whom attained the age of twenty-one. The title then accrued to him: he died, and the younger brother attained his age of twenty-one, and fourteen years afterwards brought a writ of *formedon in descender*. He only had a right to the possession for fourteen years, but still, the Court held that he was barred by the statute; and Lord Chief Justice *Mansfield* said, "The daughter and infant heir of a *feme covert* has ten years after the disability ceases, not from the death of her mother; and he referred to the statute of Fines, and assimilated the case of *Doe*, d. *Duroure* v. *Jones*, which had been decided as to the construction of that statute, to the statute in question, *viz.* that when he time begins to run, it continues so to do, notwithstanding any subsequent disability," and in that opinion he was supported by the whole Court. No decisions in equity were adverted to by my Brother *Lens*, in the course of the argument in that case; and if any had been applicable, his Lordship would have referred to them, as he was fully conversant with the practice of those Courts. With respect to the construction of the statute 32 *Hen.* 8, the arguments adduced are not sufficient for the purpose for which they were intended. The writ of *formedon in descender* was there altogether omitted, and the statute of *James* was afterwards passed for the purpose of introducing it. Here therefore, as ninety-eight years have elapsed since the first heir in tail was entitled to claim, and as the demandant founds his title on the death of his father in 1815, I think the defendant is entitled to judgment.

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Mr. Justice BURROUGH.—Various statutes of Limitations have been passed, which were intended to quiet possessions, and more particularly so with respect to landed property, the title to which depends on written documents, and not parol testimony. If deeds were to be lost or destroyed, it is impossible to say what great inconveniences might arise by permitting persons to lie by any length of time and make a claim of this description; it was therefore most wisely provided by the legislature, that the party claiming should take recent steps after his right or title accrued. Here the demandant founds his claim after the expiration of ninety-eight years, and he might lie by for any number of years, if the time prescribed by the statute could be exceeded; on the construction of which, it has been contended for him, that on the death of a preceding tenant in tail, a new title first descends to the succeeding tenant in tail as issue of the original donee, and that he is therefore within the letter of the statute. That however, appears to me to be quite the reverse. The only question is, whether the replications to the pleas of the defendant which have been demurred to are good; and I am clearly of opinion, that all which do not shew a descent to the demandant, or allege a seisin in him, within twenty years, are bad. If a seisin had been shewn within that time, it must be admitted that the demandant would properly claim title to the ancient right, but no such allegation appears in either of the replications. It is therefore only necessary to refer to the title of the demandant as set out by him in the count. There was no occasion to allege a seisin in the donee there, as it was enough to state that the title was in the original donor, and the reason is, that if a declaration be certain to a certain extent, it is sufficient; but when a plaintiff or demandant afterwards replies, there is an end to the declaration or count, and a greater degree of certainty is necessary in the replication, and more particularly so, when the only point which can confer a title is altogether denied by the defendant's pleas. The defendant, by demurring to the replications, not only raises the

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question upon the construction of the statute, but negatives the seisin of the demandant, or that the right descended to him within twenty years before the suing out of his writ. The question then is, when did the title first descend? Immediately on the death of *Henry Tolson*, in the year 1724, and his son being the first heir in tail, and lying under no disability, his title accrued in that year, and the *formedon* should have been brought within twenty years from that time. The proceeding by *formedon* is given by the statute of *Westminster* the Second (*a*), and in *Hunt* v. *Burn* (*b*), it was decided, that where there was a discontinuance by tenant in tail by fine *sur concessit*, for three lives of *A*. *B*. and *C*., and there was another fine afterwards to the use of himself and his heirs, it was no bar to the issue, by the statute 21 *Jac*. 1, though twenty years were passed after the right of *formedon* accrued; for that although he was barred of such action after twenty years had passed, yet, that he had title of entry only after the discontinuance for three lives determined, and therefore that he had only twenty years to enter after the determination of the lease for three lives. Although therefore, he was barred of his *formedon*, he might pursue his right of entry, as it was a new right which accrued to him by the deaths of the tenants for lives. It does not appear to me to be necessary to refer to any cases that have been decided upon this statute. Those which have been determined relative to the time of entry to avoid a fine, are analogous to it; and I need only again observe, that *Brook's Readings* were mere lectures, and not grave or solemn decisions; and the case cited from them can have no weight whatever with the Court. Although he might have been a learned man, and an excellent lawyer, still the case as put by him is not law, for he stated that an heir in tail, who was within age at the time of the statute, brought a writ of right. By so doing, he was out of Court, as such writ is confined to those only who claim in fee-simple. As therefore it appears to me, that all the replications

(*a*) See Co. Lit. 355 (a).——(*b*) 1 Lutw. 779. S. C. 2 Salk. 422.

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of the demandant in this case are bad in substance, I am of opinion, that he is not entitled to recover.

Mr. Justice RICHARDSON.—The question raised by this record is, whether the twenty years limited by the statute of *James* begin to run when the right or title first descends to the first heir in tail, or whether each or any succeeding tenant has a right to sue within that period after the death of the preceding tenant, or his immediate predecessor. That question is raised by the twenty-fifth plea, which does not appear to me to be answered by the replication to it. But I am of opinion that the words of the statute are of themselves a sufficient answer to the claim of the demandant. The first section is divided into four branches; the first two of which relate to writs of *formedon in descender, remainder, or reverter*; and the first part of those branches applies to the proceedings or rights which existed at the time the statute was passed; and the second, to such as might arise afterwards, and the express object of the statute was to quiet the possession of real property, and for the avoidance of suits. The first branch enacts, that "all writs of *formedon*, at any time thereafter to be sued or brought, of or for any manors or lands, whereto any person or persons then had any title, or cause to pursue any such writ, should be sued and taken within twenty years next after the end of that present session of Parliament; and that after the said twenty years expired, no such person or persons, or any of their *heirs*, should have or maintain any such writ of or for any of the said manors and lands." The word "*heirs*," must mean heirs in tail, and if they do not enter within the time prescribed by the statute, it is provided by the latter part of the first section that, in default thereof, such persons so not entering, and their *heirs*, shall be utterly excluded and disabled from such entry after to be made. It is quite clear therefore, from this branch of the first section of the statute, that if, when it was passed,

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final judgment signed and entered up as of the last Term. The defendant had brought a writ of error, and the only error assigned was the want of an original.—Under these circumstances,

Mr. Serjt. *Cross*, on a former day in this Term obtained a rule *nisi*, that the plaintiff might docket and carry in the judgment roll, as the transcript could not be made out until that was done.

Mr. Serjt. *Lens* now shewed cause, and observed, that a similar application had been made to the Lord Chief Justice at Chambers, who had refused it, unless the defendant would waive the want of the original.

Mr. Serjt. *Cross*, in support of the rule, referred to "*Evans's Practice to the Court of Common Pleas for the County Palatine of Lancaster*," and *Millington* v. *Goodmin* (a), where the venue was laid in *Lancashire*, and the Court would not allow it to be changed after writ of inquiry executed, and error assigned for want of an original writ, on the ground that a plaintiff cannot get an original in *Lancashire*, because there is no officer there to grant it.

The Court said, that they would assist the plaintiff if possible, and prevent the defendant from taking the advantage he had availed himself of, but that they had no jurisdiction to do so. That the plaintiff had created the difficulty himself, and that they could not interfere to rectify his own error.

Rule absolute.

(a) Ante, vol. I. 186.

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ALDRITT, Assignee of SKARRATT, a Bankrupt, *v.* KITTRIDGE.

Monday, Feb. 11.

Where, on a petition to the Vice Chancellor for a change of assignees, an order was obtained under the statute 5 *G.* 2. *c.* 30. *s.* 31. directing that a new assignment should be executed to the plaintiff, in which the two former assignees should join, and one of such assignees absconded, and the assignmentwas executed by the plaintiff, and the other alone:—Held, that the plaintiff could not maintain an action of *assumpsit* for goods sold and delivered in his character of assignee, as an application should have been previously made to the Vice Chancellor, stating the reason of the non-joinder of the assignee who had absconded.

THIS was an action of *assumpsit* for goods sold and delivered, and brought by the plaintiff as assignee of *Skarratt*, a bankrupt. The defendant pleaded the general issue.

At the trial of the cause before Lord Chief Justice *Abbott*, at the last *Summer* Assises at *Stafford*, it appeared that a commission of bankruptcy was issued against *Skarratt* in *May*, 1815, and that one *Pemberton*, and the father of the defendant, were appointed his assignees; that they being friends of the bankrupt, allowed him to continue in possession of his property, but it was afterwards discovered that the defendant's father had been discharged under an insolvent act, on which a petition was presented to the Vice Chancellor, praying for a change of assignees, on which his Honor ordered that a new assignment should be executed of the bankrupt's estate and effects to the plaintiff, in which the two former assignees should join. For the plaintiff, the assignment was produced, for the purpose of shewing that he had been appointed assignee, when it was objected for the defendant, that the petition on which the order of the Vice Chancellor was founded, should be produced and proved, as well as the order itself, as the statute 5 *Geo.* 2. *c.* 30. *s.* 31. (*a*),

(*a*) By which, after reciting that it might be found necessary, that as well assignments of bankrupt's estates already made by Commissioners, as assignments thereafter to be made pursuant to the choice of creditors, should be vacated, and new assignments be made of the debts and effects unreceived and not disposed of by the then assignees to other persons to be chosen by the creditors as aforesaid:—it was enacted, that it should be lawful to and for the Lord Chancellor for the time being, upon petition of any creditors, to make such order therein as he should think just and reasonable: and that in case a new assignment should be ordered to be made as aforesaid, that then such debts, effects, and estate of such bankrupt should be thereby effectually and legally vested in such new assignee or assignees; and that it should be lawful for him and them to sue for the same in his or their name or names, and to discharge any

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only authorizes such order to be made upon the petition of creditors. It also appeared, that since the order was made, *Pemberton* had absconded, and that the defendant's father only had executed the assignment to the plaintiff; and the case of *Bloxam* v. *Hubbard* (*a*), was relied on for the defendant, to shew that it was necessary that *Pemberton* should have joined in the execution of such assignment.

His Lordship was inclined to think that the Vice Chancellor was empowered by the statute to make an order for the removal or change of assignees, without a petition being presented to him for that purpose. The Jury found a verdict for the plaintiff, but leave was given the defendant to move to set it aside, and that a nonsuit might be entered; in case the Court should be of opinion that the plaintiff was not entitled to recover.

Mr. Serjt. *Hullock*, in the last Term, accordingly obtained a rule *nisi*, and relied on the case of *Ex parte Bainbridge* (*b*), to shew that the order of the Vice Chancellor, made under the statute 5 *Geo.* 2. *c.* 30. *s.* 31. for the removal of assignees, was founded upon the petition of the creditors, which should have been produced and proved at the trial, as well as the order of the Vice Chancellor, which had been founded thereon; or that at all events, *Pemberton*, one of the former assignees, should have joined with the father of the defendant in the execution of the assignment to the plaintiff, as his Honor had expressly ordered it to have been done; and

action or suit, or to give any acquittance for such debts, as effectually to all intents and purposes as the assignee or assignees in the former assignment might have done, in case no new assignment had been made; and that the said Commissioners should cause public notice to be given in the two *London* Gazettes that should immediately follow the removal of such assignee or assignees, and the appointment of such other assignee or assignees as aforesaid, that such assignee or assignees was or were removed, and such other assignee or assignees appointed in his or their stead; and that such persons as were indebted to the said bankrupt's estate, should not pay such debt or debts to such assignee or assignees as should be removed as aforesaid.

(*a*) 5 East, 407.——(*b*) 6 Ves. 451.

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he cited the case of *Bloxam* v. *Hubbard*, where, on the removal of one assignee, the remaining assignees brought an action of trover, and there was no plea in abatement to the whole action, they were held entitled to recover their proportional parts only of the property for which the action was brought. This however, was an action of *assumpsit*, in which it was necessary for the two original assignees to have executed the assignment according to the order of the Vice Chancellor, and the action should have been brought in the joint names of the plaintiff and them, or at all events, an application should have been made to his Honor, stating that *Pemberton* had absconded, and that he might be removed, and another person appointed in his stead.

Mr. Serjt. *Lens* now shewed cause, and subm tted in the first place, that as the order of the Vice Chancellor was drawn up on hearing the petition read, it was unnecessary to produce the latter in evidence; and more particularly so, as the order, after reciting the nature of such petition, and the object of the creditors in presenting it, concluded by directing a new assignment to be made, and that such assignment should be executed to the plaintiff, in which the two former assignees were to join. It was not absolutely necessary that the terms of that order should be strictly complied with, as it merely directed the two former assignees to be joined if it should be necessary to do so, and although one of them had executed it, still it appeared that the other had absconded, and there was no probability of his returning to this country, so that he might never have been compelled to join the plaintiff as an assignee. Under these circumstances therefore, the plaintiff was justified in bringing the present action, and as the Jury have found a verdict for him, it cannot be disturbed.

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Mr. Serjt. *Hullock*, in support of the rule, was stopped by

The Court, who observed, that as only one of the old assignees had joined in the execution of the assignment to the plaintiff, the other being out of the kingdom, an application should have been made to the Vice Chancellor; as by his order, both the former assignees were directed to execute the new assignment to the plaintiff; and it was either necessary that such order should have been complied with, or a reason assigned and represented to him that it could not be done. That in *Ex parte Bainbridge* (*a*), where all the assignees being dead, and the survivor having left an infant heir, a petition was presented to the Chancellor, praying that new assignees might be chosen, and that the Commissioners might execute a new bargain and sale, and assignment; the former being vacated, his Lordship doubted whether it could be done, as nothing could take the assignment out of the infant heir of the surviving assignee; yet he was afterwards of opinion, that the statute gave him an authority to do so, and he ordered new assignees to be chosen. Here however, the Vice Chancellor has merely directed the old assignees to join in the assignment to the plaintiff; and in *Bloxam* v. *Hubbard* (*b*), it was decided, that an order of the Lord Chancellor made under the statute 5 *Geo.* 2., upon the petition of creditors for removing one of several assignees, did not operate to divest the bankrupt's legal estate out of such removed assignee, and consequently that the latter ought to join in an action of trover, brought by his co-assignees for a ship belonging to the bankrupt's estate. There too, no new assignment was made, but one of the assignees was merely removed by the order of the Chancellor. This rule, therefore, must be made

Absolute.

(*a*) 6 Ves. 451.——— (*b*) 5 East, 407.

1822.

AUSTIN *v.* HANKIN (a Prisoner).

Tuesday, Feb. 12.

An insolvent may be discharged under the Lords' Act, although he has been remanded by the Commissioners of the Insolvent Debtors' Court for misconduct towards the creditor at whose suit he was charged in execution.

THE defendant had been remanded by the Commissioners of the Insolvent Debtors' Court for two years, for misconduct towards the plaintiff and another creditor, in putting them to unnecessary expence for the recovery of their debts. He now applied to be discharged under the Lords' Act (*a*), when

Mr. Serjt. *Peake* opposed his discharge, and submitted that as the defendant had been remanded by the Insolvent Debtors' Court, this Court would not interfere, and more particularly so, as he ought to apply there for his discharge, as he was detained in custody under their sentence alone.

The Court ordered an inquiry to be made in the Court of King's Bench, whether it was usual for an application of this nature to be made there, and the officer answered that it was, and that it was the uniform practice to discharge a defendant under such circumstances. They therefore observed, that he was entitled to be discharged under the Lords' Act, which was in the nature of a civil remedy, although he was remanded by the Court below for misconduct or fraud, which they were authorized to do, as being within the letter of the statute, under which he now came up to be discharged; and they referred to the case of *Nicholls* v. *Neilson* (*b*), where this Court would not regulate their proceedings as to the discharge of an insolvent, by what had passed in the Insolvent Debtors' Court, and therefore determined that it was no ground for opposing his discharge, that he had been remanded by that Court for fraud.

The defendant was accordingly

Discharged.

(*a*) 32 *Geo.* 2. *c.* 28. *s.* 13.——(*b*) 2 Marsh. 200. S. C. 6 Taunt. 492.

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Tuesday, Feb. 12.

Hardy *v.* Innes.

Where indigo was insured upon a valued policy at and from the loading port to the port of delivery, and the ship was sunk at the former port, in consequence of which the indigo was immersed in salt water, and after survey was sold by public auction there, at a loss of 71*l. per cent.*, and a verdict was found for the assured as for a total loss, subject to a reference to an arbitrator to ascertain the amount of such loss, who awarded a loss of 41*l.* 15*s.*10*d. per cent.* on the defendant's subscription:—The Court refused to set aside such award, although it appeared that the indigo had been dried by the purchasers at the loading port, and afterwards re-shipped by them in other vessels, and that on its arrival at the port of delivery, it produced nearly as much as if it had received no injury whatever.

This was an action on a policy of assurance effected on the 6th *March*, 1821, at and from *Jamaica* to the United Kingdom, to the amount of 8000*l.*, on *indigo* and other goods, indigo valued at 44*l. per* seron, by ship or ships, which was afterwards declared to be on *indigo* by the ship *Harrington*; and the plaintiff, in his declaration, stated the interest to be in one *Anthony Haynes*, and averred a loss by perils of the sea.

At the trial of the cause before Mr. Justice *Park*, at *Guildhall*, at the Sittings after the last *Trinity* Term, it appeared that one hundred and ten serons of indigo were shipped on board the *Harrington*, on the 27th *January*, 1821, at *Kingston, Jamaica*, and that on the 30th of that month, she was upset there and sunk, in consequence of a squall of wind, and that the indigo was under water, and part of it got out of the vessel on the same day she was upset, and the other part of it on the following day; that at the time the accident occurred, the vessel had but little ballast on board, and that the indigo was sold by public auction at *Kingston*, partly on the 31st *January*, and the remainder on the following day, and that a loss arose upon such sale to the amount of 71*l. per cent.*; that it was washed by the purchasers with fresh water, and exposed to the sun to dry, and afterwards re-packed in fresh skins, and shipped to *England* by several vessels, in the course of *February* and *March*, 1821, and arrived in *London* in due course; that the *Harrington* was repaired a short time after the accident, and sailed from *Kingston* on the 31st *March* for *London*, where she also arrived in due course, and that when the indigo arrived there, it sold from 4*s.* 6*d.* to 5*s. per* pound. The grounds of defence made on the part of the defendant were, first, that the ship was not sufficiently ballasted when the accident happened at *Kingston*; and secondly, that the underwriters were liable only to an average, and not to a total loss with benefit of salvage.

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The learned Judge left it to the Jury to say, first, whether the ship was properly ballasted at the time of the accident? and secondly, whether the sale of the indigo was fair? and he observed, that there could not be any claim for a total loss, as there had been no abandonment. The Jury found both those questions in the affirmative, on which a verdict was entered for the plaintiff for 500*l.* being the amount of the damages alleged in the declaration, subject to a reference to an arbitrator, who was to ascertain and settle the amount of the loss the plaintiff was entitled to recover from the defendant. The arbitrator afterwards made his award, and awarded that the damages found by the Jury should be reduced to the sum of 208*l.* 19*s.* 1*d.*, being at the rate of about 41*l.* 15*s.* 10*d.* *per cent.* on the defendant's subscription.

Mr. Serjt. *Pell*, in the last Term, obtained a rule *nisi*, that this verdict, and the award, should be severally set aside and a new trial granted; or the damages reduced to such sum as the Court should think fit to direct. He founded his motion on an affidavit stating the above circumstances, and that on the attendance before the arbitrator, the plaintiff's attorney produced no other evidence than the account sales of the hundred and ten serons of indigo made in *Jamaica*, on the 31st *January* and 1st *February*, 1821, and a statement of loss, made up on the principle of a total loss with benefit of salvage, and insisted upon the plaintiff's right to recover as for such loss, by giving credit only for the net proceeds on the sale of the indigo at *Jamaica*:—that the solicitor for the defendant protested against that account being received by the arbitrator, and required the plaintiff's attorney to produce the average charges, to enable an account to be made up as for an average loss, which he declined to do.—It was also sworn, that if the loss in question was to be made up as an average loss, the same would not amount to 15*l.* *per cent.*, the indigo having sold in *London* at prices nearly equal to other indigo of a like description, which had been shipped in

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another vessel, and which arrived in *London* without sustaining any injury whatever.

Mr. Serjt. *Lens*, and Mr. Serjt. *Hullock*, now shewed cause, on an affidavit of the plaintiff's attorney, which stated that the indigo was materially damaged in consequence of its immersion and continuance in salt water, at *Kingston*; that the owner, in whom the interest was averred to be, had left *Jamaica* before the time of the loss, and that the captain of the *Harrington* applied to the most respectable mercantile house there for advice; in consequence of which a survey was immediately had, and the indigo advertised and sold by public auction as soon as possible after the accident, and that several persons who intended to purchase it, after inspecting the serons, considered it to be too hazardous a speculation to enter into, from the injury the indigo had sustained from the salt water. They submitted, that under the circumstances, the arbitrator had most properly calculated the loss according to the difference between the value of the indigo if sound, and what it fetched when sold in its damaged state, by public auction at *Kingston*. It cannot be contended for a moment that the plaintiff, or the assured, has not sustained the loss awarded by the arbitrator, nor that the captain did not act *bonâ fide* in proceeding to the sale in question, by which alone the extent of damage the indigo had sustained by its immersion in salt water could be fairly ascertained; and such ascertainment of deterioration formed the basis of the calculation of the loss in question. The assured had no authority to call upon the purchasers in *Jamaica*, to render accounts of charges and expences incurred by them to make the indigo marketable. This case therefore, is altogether distinguishable from that of *Lewis* v. *Rucker* (*a*), as the indigo was not only decomposed at the time of the sale; but its weight was materially increased by the salt water it had imbibed, and it was altogether a speculation whether it could be rendered saleable by any process what-

(*a*) 2 Burr. 1167. See also *Johnson* v. *Sheddon*, 2 East, 581.

ever. The only prudent course that could have been adopted was, to sell the indigo at *Jamaica* as soon as possible after the injury it had sustained, and the criterion of damage the plaintiff has received, is the price it sold for there in its damaged state.

Mr. Serjt. *Pell*, and Mr. Serjt. *Taddy*, in support of the rule, insisted that the award could not be sustained, as the arbitrator had made up the loss on the principle of a total loss with benefit of salvage, and not as an average loss; and that he ought to have estimated the damage the plaintiff had sustained according to the rule laid down in *Lewis* v. *Rucker*, *viz.* by computing the proportion of the loss at the port of delivery, after deducting the expences of preparing and drying the indigo for re-shipment. The sum awarded amounts nearly to a total loss, as upon the plaintiff's own statement, before the trial, such loss, with benefit of salvage, was 41*l.* 19*s.* 2*d.*, and that awarded by the arbitrator amounts to 41*l.* 15*s.* 10*d.* The only evidence adduced before the arbitrator was the accounts of what the indigo sold for at *Jamaica*, and not what it would have fetched in case it had been brought to its port of delivery; and it appeared at the trial, that after it had been dried, re-packed, and sent to this country by other ships, it was worth nearly as much as indigo of a similar description which had been sent by another vessel, and which had received no injury whatever. To enable the arbitrator to have made up an average loss, the invoices, account charges incurred in *Jamaica*, and the expences attending the forwarding the goods from thence to *London*, as well as those attending the sale there, and the difference between the indigo when damaged and when sound, would have formed materials on which the amount of an average loss might have been arrived at by proper calculations. These accounts were not before the arbitrator, and if the award made by him be set aside, it will merely have the effect of sending the case down to a new trial.

Cur. adv. vult,

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Lord Chief Justice DALLAS, on this day, delivered the judgment of the Court as follows:—

The only question in this case is, whether the arbitrator has proceeded on a right principle in making his award, and whether he has considered the loss in question as a total or an average loss? It has been justly observed, in a valuable Treatise on the Law of Insurance (*a*), that the subject of an average loss seems to be of all others the most intricate and perplexing. That this case is not without difficulty, is manifest from the manner in which it has been treated at the bar, and the attention the Court has paid to it since the argument. The rule laid down in *Lewis* v. *Rucker* is inapplicable to the present question, as the loss insured against did not depend on the fluctuation of the market, nor did the goods so insured arrive at their port of destination, as they were sold at their port of loading in a damaged state, and the produce of the sale there was far less than if they had been dried and forwarded to their port of delivery. Suppose the original value of the indigo at the port of loading was 3000*l.*, and from the injury sustained the gross proceeds at the port of delivery would have amounted to 4000*l.*, whereas if it had not been damaged, it would have produced 5000*l.* the difference would be one-fifth, and the insurer would be bound to pay one-fifth of the original or insured value; but if on the sale at the loading port, it produced only 1500*l.*, applying the rule as laid down in *Lewis* v. *Rucker*, the assured would only be entitled to one-half the original or insured value, although he had a right to expect that it would have fetched 4000*l.* if it had been sold at the port of delivery. It is quite clear, that the assured is entitled to a compensation, as the loss in question arose by a peril insured against, although it might have been disadvantageous to the underwriters that the sale should have taken place at the loading port, as the indigo in question was of far less value there than it would have been if it had been dried and

(*a*) See Mr. Justice *Park* on Insurance, 6th edit. 133.

disposed of at the port of delivery. If, however, the sale were fair and *bonâ fide* made, it was not incumbent on the assured to prove what price the purchasers at *Jamaica* eventually obtained for the indigo, after it had been dried and re-manufactured by them; nor could they be called on by the assured to render an account of the charges incurred by them to make it marketable in this country. When they made the purchase, it was a chance whether it would eventually turn out to any advantage, and it was bought on mere speculation. Besides, it might have been carried to *Bristol* or *Liverpool*, where in all probability, it would not have produced so great a price as it did in *London*. On the whole therefore, as it appears to the Court that justice has been done, and we cannot lay down a better rule than that adopted by the arbitrator, we are of opinion that there is no substantial reason for setting aside the award which he has made, and this rule must consequently be

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Discharged.

ATTWOOD and Others *v.* RATTENBURY (*a*).

Tuesday, Feb. 12.

THIS was an action of *assumpsit*, brought by the plaintiffs, as indorsees, against the defendant, as drawer of a bill of exchange for 200*l.* dated on the 22d *September*, 1814, and drawn by the defendant on, and accepted by one *Charles Mayor*, payable two months after date to the order of the defendant, and by him indorsed to one *Ogle*.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last Term, it appeared that the bill had before its maturity, been indorsed by *Ogle*,

Where the plaintiffs, as indorsees of a bill of exchange, sued the drawer in their own right, and it appeared that the bill had been indorsed to them in blank, before the death of one of the firm who was a partner with the plaintiffs as bankers:—

Held, that the action was well brought without their describing themselves as surviving partners in the declaration, as they were not bound to prove the partnership, or that the bill was indorsed or delivered to them jointly with their deceased partner. *Secus*, if the bill had been specially indorsed.

(*a*) See ante, vol. v. 209.

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as surviving partners; and in *Ord* v. *Portal* (*a*), it was held, that where several persons sue as indorsees of a bill, if the bill appears indorsed in blank, there is no necessity for their proving that they were in partnership together, or that the bill was indorsed or delivered to them jointly. This therefore, is not like the case of *Jell* v. *Douglas*, where goods were sold by two partners, one of whom had died before the commencement of the action; because the indorsement of a bill of exchange in blank makes it payable to the bearer, who cannot be called on to prove his title to sue, as it is sufficient for him to shew he is the holder.

Mr. Serjt. *Lens* and Mr. Serjt. *Taddy*, in support of the rule, insisted that as the bill in question was indorsed to the plaintiffs in the name of their firm, one of whom was since dead, it was immaterial whether it had been indorsed to them specially or in blank, for that by such indorsement it vested a joint right in them to sue; and although possession of a bill indorsed in blank may give a *primâ facie* title to the holder, still if it can be shewn that the plaintiffs became wrongfully possessed of it, either by finding or otherwise, such evidence would of itself, unaccompanied with proof that the bill had been given, without consideration, be sufficient to negative such *primâ facie* title. Besides, there was no evidence to shew that there had been any arrangement of the accounts of the firm of which *Spooner* was a partner, after his death, by which the bill became the property of the plaintiffs in their own right, which at all events ought to have been proved, to warrant the declaration. A distinction was laid down in the case of *Machell* v. *Kinnear* (*b*), where a bill of exchange was by the direction of the payee indorsed in blank, and delivered to *A. B. & Co.* who were bankers, on the account of the estate of an insolvent, which was vested in trustees for the benefit of his creditors:—it was held that *A.* and *B.* two of the members of the firm, and

(*a*) 3 Camp. 239. S. P. *Rordasnez* v. *Leach*, 1 Stark. N. P. C. 446.
(*b*) 1 Stark. N. P. C. 499.

previously negociated it, it became a paid bill, and its subsequent negociability was destroyed. Besides, the plaintiffs had their remedy against *Ogle* for money had and received, and the action against the defendant as drawer should have been brought in the name of the latter; but in point of fact, it was drawn for his accommodation alone. Secondly, the case of *Jell* v. *Douglas* (*a*), is decisive to shew that it was necessary for the plaintiffs to have stated in the declaration, that the bill in question had been indorsed to them, together with *Spooner*, their then partner, since deceased. There never was a cause of action to the plaintiffs alone, for when the bill was indorsed by *Ogle*, it was indorsed to them in the name of the firm, of whom *Spooner* was one, and the plaintiffs therefore should have declared as surviving partners, and not in their own right. It was not necessary that it should have been specially indorsed to them, for by the indorsement it amounted to a delivery to the whole firm.

The Court granted the rule on the second point only.

Mr. Serjt. *Vaughan* now shewed cause, and contended that a blank indorsement on a bill of exchange, conveyed a right to the holders to sue, and gave a joint right of action to as many as might agree to sue on the bill, without reference to the indorsement, although such persons were not in partnership. If there be any difficulty in proving an indorsement on a bill of exchange at *nisi prius*, such indorsement may be erased at the time of the trial if it be not stated in the declaration. The legal effect of an indorsement in blank, transfers the right of action to any *bonâ fide* holder; and so long as it continues in blank makes the bill payable to such holder, whose title thereto cannot be impeached or questioned. Here it is quite clear that the plaintiffs were holders of the bill; but it has been said, that when it was indorsed to them, there was another partner in the firm, whose death ought to have been stated in the declaration, but their title to sue did not accrue to them

(*a*) 4 B. & A. 374.

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distinction has been drawn between a bill indorsed specially, or in blank. In the former case, it has been often ruled, that in an action by the payees or indorsees, strict evidence must be given that the firm to whom it is indorsed consists of the persons who sue as plaintiffs on the record, whilst an indorsement in blank conveys a joint right of action to as many as agree to sue on the bill (*a*).

Mr. Justice BURROUGH concurred.

Mr. Justice RICHARDSON.—The distinction is, that a contract must be declared on in the terms in which it is made, and if two persons are joint sellers of goods, they must both join in an action brought to recover the price, and if one of them sue alone when both are alive it is a fatal variance, and if one be dead, it is necessary that that fact should be stated in the declaration, and the plaintiff should declare as surviving partner, as the contract was not made with him alone. A bill of exchange however is transferable by delivery, and in case one partner withdraws from the firm, the others become the holders of such an instrument in point of law, and it is quite clear that they may sue in their own right as indorsees if the bill is indorsed to them in blank, as it is not incumbent on them to prove their joint title to sue on the bill by shewing that they were partners at the time of such indorsement, or by proving a transfer to them jointly.

Rule discharged.

(*a*) See 3 Camp. 240.

END OF HILARY TERM.

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1. Where an attachment of privilege was made returnable after the *essoign* day, and before the *quarto die post*, instead of a day certain in full term; the Court allowed it to be amended on payment of costs by the plaintiff, and those of the application by

the defendant to set it aside. *Adams* v. *Luck*, T. 2 *G.* 4.
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2. Upon error assigned of a misnomer of the christian name of one of the plaintiffs below in the warrants of attorney, the Court of Exchequer Chamber held it to be immaterial;—and they also allowed the transcript of the record to be amended before amendment in the Court below, where there had been no verdict and judgment entered in the *nisi prius* record and judgment roll upon a plea of set-off. *De Tastet* v. *Rucker*, T. 2 *G.* 4. 135

3. In an action for a breach of promise of marriage, the declaration contained three counts, the first to marry on request, the second within a reasonable time, and the third generally. On a motion to amend the declaration by inserting a new count to marry on a particular day, the Court ordered the first count to be amended by striking out the promise to marry on request, and introducing a particular day therein, although the declaration had been filed more than two Terms before the application was made; and directed the costs of such application to abide the event of the cause. *Horston* v. *Shilliter*, H. 2 & 3 *G.* 4. 490

ANNUITY.

1. Debt does not lie for the arrears of an annuity issuing out of lands, and payable to the annuitant for life, although it is not stated in the declaration that the grantor had a freehold in the premises out of which it was payable, as it must be inferred that he had such an interest where nothing appears to the contrary. *Kelly* v. *Clubbe*, M. 2 *G.* 4. 335

2. Where, upon the grant of an annuity, the agent of the grantees, on paying the consideration-money, retained a considerable sum for the expences of preparing the deeds, and a further sum by way of advance, to answer the first year's payment of the annuity, the Court set aside the deeds against a person who was surety for the payment of the annuity by two collegians, who were minors at *Cambridge*;—on the ground that this was an illegal retainer, but they imposed on such trustee the terms of returning the principal with interest, on taking an account before the Prothonotary. *Mence* v. *Hammond*, H. 2 & 3 *G.* 4. *Page* 491

APPEARANCE.

See ARREST, 2.
EJECTMENT.

APPOINTMENT.

See DEVISE, 1. 4. 6.

APPORTIONMENT OF COSTS.

See COSTS, 2.

ARBITRATION.

See AWARD.

ARBITRATOR.

See AWARD.

ARREST.

See BARON AND FEME, 2, 3.
SHERIFF, 1, 2.

1. Where a sheriff's officer, on arresting the defendant, took five shillings from him, with a promise to pay the remainder of what was usual at a future day, and allowed him to go at large without taking a bail bond, without the plaintiff's assent, he cannot

be surrendered in discharge of his bail; and an attachment having issued against the sheriff for not returning the writ, it cannot be set aside, nor will the Court relieve him by allowing him to put in and justify bail. *Collins* v. *Snuggs*, T. 2 *G.* 4. *Page* 111

2. If a defendant be arrested by the initials of his christian name only, and sign a bail bond in a similar manner; the Court will discharge him on entering a common appearance, on his undertaking to bring no action. *Taylor* v. *Rutherman*, M. 2 *G.* 4. 264

3. If a defendant be arrested for a sum under 20*l.*, and defend the action until the debt and costs amount to nearly 100*l.*, and afterwards gives a warrant of attorney for the amount of the original debt and such costs, under which judgment was entered up, and he was taken in execution:—Held, that he was not entitled to his discharge under the statute 48 *Geo.* 3. c. 123, although he had lain in prison more than twelve months, as the warrant of attorney did not appear to have been improperly obtained from him, nor was he in custody at the time it was given. *Robinson* v. *Sundell*, M. 2 *G.* 4. 287

ARREST OF JUDGMENT.

See INSURANCE, 1.

ASSESSMENT.

See INCLOSURE ACT.

ASSIGNEES.

See BANKRUPT.
DEED, 1.
SHERIFF, 3. 4.

ASSIGNMENT.

See BANKRUPT, 6.
OFFICES.
SHERIFF, 4.
STAMPS, 1.

ASSUMPSIT.

See AMENDMENT, 3.
BANKRUPT, 3.
CARRIER.
FRAUDS, STATUTE OF.

1. Where the defendant agreed to purchase a lot of trees for a certain sum, and pay for the same according to conditions of sale, and afterwards felled and carried away part of them without making such payment, and refused to pay until the remainder had been delivered:—Held, that the executors of the vendor having failed to establish a count on the special contract, might recover the value of the trees taken by the defendant under counts for goods sold and delivered, as the defendant by such taking had disaffirmed the entirety of the contract. *Bragg* v. *Cole*, T. 2 *G.* 4. *Page* 114

2. Where the plaintiff and *J. T.* were appointed co-executors, and the latter, at the time of the death of the testator, was in co-partnership with the defendant until it was discontinued, after which, and before any adjustment of the accounts of the firm, *J. T.* died, leaving the plaintiff his co-executor him surviving; and *J. T.* during the partnership, had paid large sums belonging to the testator's estate into the partnership account, and of which a separate account was kept in the partnership books to the credit of the testator's estate; and none of the funds of such estate ever came to the plaintiff, but were received by the partnership from *J. T.* his co-executor, without the knowledge of the plaintiff, and the house of *J. T.*, and the defendant became insolvent, and at the dissolution of the partnership there appeared on the books a

credit to the testator's estate, no part of which was paid; and the plaintiff, the surviving co-executor of *J. T.* having commenced an action for money had and received, and declared in his own right, and not as executor, against the defendant, in his own right, and not describing him as the surviving partner of *J. T.*:—Held, that such action could not be maintained, as the fact of the plaintiff's being such surviving co-executor should have been stated in the declaration. *Fitzgerald* v. *Boehm*, M. 2 *G.* 4. *Page* 332

ATTACHMENT.

See ARREST, 1.
ATTORNEY.

On a motion for an attachment against the Warden of the Fleet for not bringing a defendant into Court under a writ of *habeas corpus*, one of his officers swore that the defendant had the benefit of the rules, but that he could not be found until after the time for bringing him into Court had expired, when he was confined within the prison until he was discharged under an order of the Insolvent Debtors' Court:—The rule for the attachment was ordered to be discharged, on the Warden's paying the costs of the application. *Park* v. *Torre*, M. 2 *G.* 4. 260

ATTACHMENT OF PRIVILEGE.

See AMENDMENT, 1.

ATTESTING WITNESS.

See BOND.
DEED, 1.
EVIDENCE, 2, 4.

ATTORNEY.

See AMENDMENT, 1.
COSTS, 4.

Where a person not having been admitted an attorney of this Court, had acted as such by suing out process; they would not grant an attachment against him, but left the party to sue for the penalty given him by the statute 2 *Geo.* 2. c. 23. s. 24. *Matthews* v. *Royle*, T. 2 *G.* 4. *Page* 70

AUCTION.

See AWARD, 2.

Where the plaintiff, on the sale of a barge by auction under an execution, addressed the company, stating that he had built it for the person against whom the execution was issued, who had not paid him for it; on which no person bid against him, but the auctioneer refused to knock it down to him at his first bidding, when a friend of his made another bidding, and the plaintiff advanced one shilling more, and paid a deposit in part of the purchase money:—Held, that he did not acquire any property in the barge under such sale. *Fuller* v. *Abrahams*, M. 2 *G.* 4. 316

AVERAGE LOSS.

See EVIDENCE, 1.
INSURANCE, 7.

AVOWANT.

See PRACTICE, 1.

AWARD.

1. Where a parol submission was made by an infant plaintiff to a reference before trial, and an arbitrator made an award in favor of the defendant: on the plaintiff's refusing to comply with the terms of such award, the defendant may proceed to trial by proviso. *Godfrey* v. *Wade*, H. 2 & 3 *G.* 4. 488
2. Where indigo was insured upon a valued policy at and from the loading port to the port of deli-

very, and the ship was sunk at the port, in consequence of which the indigo was immersed in salt water, and after survey was sold by public auction at a loss of 71 *per cent.*, and a verdict was found for the assured as for a total loss, subject to a reference to an arbitrator to ascertain the amount, who awarded a loss of 41*l.* 15*s.* 10*d.* *per cent.* on the defendant's subscription. The Court refused to set aside such award, although it was found that the indigo had been dried by the purchasers at the loading port, and afterwards shipped by them in other vessels, and that on its arrival at the port of delivery it produced nearly as much as if it had received no injury whatever. *Hardy* v. *Innes*, H. 2 & 3 *G.* 4. *Page* 574

BAIL.

See ARREST.
SHERIFF.

1. Notice of bail residing "at *Leeds*," is too general, although the bail had been found to be resident there; but the Court allowed time to amend the notice, and make further enquiry as to the sufficiency of the bail. *Baxter's bail*, T. 2 *G.* 4. 44
2. But notice of bail, as residing at "*Clapham*," is sufficient if he live in the "*Clapham* Road." *Piesse* v. *Gibson*, M. 2 *G.* 4. 332

BAIL BOND.

See ARREST.
BARON AND FEME, 2, 3.

BANKRUPT.

See SHERIFF, 2, 3.

1. A person who purchases dead horses for his dogs, and sells the skins and bones, does not thereby become a trader, although he may sell such skins at a profit. *Summersett* v. *Jarvis*, T. 2 *G.* 4. *Page* 56
2. Where a bankrupt was required by his assignees on his last examination, to deliver to them his books of account, which he did: Held, that he must be deemed to have delivered them on compulsion; and it being afterwards found that he was not a trader, and that the commission had improperly issued against him, that he might support an action of trover against such assignees, without any previous demand of the books. *Id.* *Ib.*
3. In an action for the use and occupation of premises against the assignees of a bankrupt:—Held, that the deed of assignment of the bankrupt's effects produced by the defendants at the trial, under a notice from the plaintiff so to do, was admissible in evidence without proof of the execution by the subscribing witness, as it appeared that two of the assignees had continued to occupy the premises after the act of bankruptcy, and thereby claimed a beneficial interest under the deed. *Orr* v. *Morice*, M. 2 *G.* 4. 347
4. Where a defendant in an action brought against him by the assignee of a bankrupt, pleaded the general issue, without giving notice of his intention to dispute the bankruptcy, he may, under a Judge's order, have leave to withdraw such plea, and plead it *de novo* with the notice required by the 49 *Geo.* 3. *c.* 121. *s.* 10. *Gardner* v. *Slack*, H. 2 & 3 *G.* 4. 489
5. Where in an action of trover brought in C. P. to try the validity of a commission of bankrupt

issued against the plaintiff by the defendant as his assignee, the latter produced an office copy of a roll in the Court of King's Bench, by which it appeared that an action was commenced there against the plaintiff and his partner more than six years before, and continuances, brought down to the Term before the trial in C. P.:—Held, that the petitioning creditor's debt, on which the commission was founded, was not barred by the statute of Limitations, for as long as a remedy is open, by which the debt may be recovered any where, it does not fall within the operation of that statute. *Gregory* v. *Hurrill*, H. 2 & 3 *G.* 4. *Page* 525

6. Where on a petition to the Vice-Chancellor an order was obtained under the statute 5 *Geo*, 2. *c.* 300. *s.* 31. directing that a new assignment should be executed to the plaintiff, in which the two former assignees, and one of such assignees absconded, and the assignment was executed by the plaintiff and the other alone:—Held, that the plaintiff could not maintain an action of assumpsit for goods sold and delivered, as an application should have been previously made to the Vice-Chancellor, stating the reason of the non-joinder of the third assignee. *Aldritt* v. *Kittridge*, H. 2 & 3 *G.* 4. 569

BARON AND FEME.

1. It seems that if a married woman be taken in execution for a debt contracted by her before marriage, she cannot be discharged, although the husband be in custody on *mesne* process in the same suit. At all events, the application for granting or refusing such discharge is in the discretion of the court. *Chalk* v. *Deacon*, T. 2 *G.* 4. *Page* 128

2. A *feme covert* on being arrested, was discharged on filing common bail, though separated from her husband by a divorce *à mensâ et thoro*, she having appealed against the sentence of divorce, which appeal was pending at the time she was arrested. *Hookham* v. *Chambers*, M. 2 *G.* 4. 265

3. Where a married woman was arrested as the drawer of a bill of exchange, and had given a bail bond, the Court ordered it to be delivered up to be cancelled, on an affidavit of her coverture, and that she did not represent herself to be sole and unmarried. *Samwell* v. *Jenkins*, H. 2 & 3 *G.* 4. 500

BILLS OF EXCHANGE.

See BARON AND FEME, 3. ERROR, WRIT OF. FORGERY.

1. In an action by the payee against the drawer of a bill of exchange, the declaration stated that the latter drew it at "*St. Helena*," to wit, at "*Westminster*," and did not aver a protest either for non-acceptance or non-payment. On the production of the bill, it was dated at *St. Helena*, and not stamped.

On its being objected that it was inadmissible as an inland bill for want of such stamp, and that the plaintiff had given no evidence of a protest for non-acceptance or non-payment:—Held, that as there was evidence of a subsequent promise by the defendant to pay the amount of the bill, coupled with a letter written by his attorney, offering terms for payment, it was a

waiver of those objections, although such attorney swore that such offer was made without prejudice. *Patterson* v. *Becher*, M. 2 *G.* 4. *Page* 319

2. Where the plaintiffs as indorsees of a bill of exchange, sued the drawer in their own right, and it appeared that the bill had been indorsed to them in blank before the death of one of the firm who was a partner with the plaintiffs as bankers:—Held, that the action was well brought, without describing themselves as surviving partners in the declaration, as they were not bound to prove the partnership, or that the bill was indorsed or delivered to them jointly with their deceased partner. *Attwood* v. *Rattenbury*, H. 2 & 3 *G.* 4. 579

BOND.

See PRACTICE, 9.

Where, in an action of debt on bond, it was sworn that the deponent had learned that the attesting witness kept out of the way to avoid an arrest:—Held, that this was not a sufficient reason for dispensing with the attendance of such subscribing witness to serve the execution of the bond by the obligor, and evidence of his hand-writing having been given *aliunde*, on which the obligee obtained a verdict, the court ordered a new trial. *Pytt* v. *Griffith*, H. 2 & 3 *G.* 4. 588

CARRIER.

See SHIP.

1. In an action on the case in the King's Bench against ten defendants, the plaintiff declared that before and at the time of the grievances complained of, they were proprietors of a stage coach for the conveyance of passengers for hire from *A.* to *B.*, and that being so, they received the plaintiff as an outside passenger, to be safely conveyed thereon from *A.* to *B.*, for hire to them in that behalf; and that by reason thereof they ought to have safely conveyed him accordingly; and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskilfulness, and default of themselves and their servants, the coach was overset; by means whereof the plaintiff was hurt, and sustained other injuries. A jury having found a verdict against eight of the defendants only, and in favor of the other two, and judgment being entered accordingly:—Held, that as the action was founded on a breach of duty imposed by the custom of the realm, which was a breach of the law, and as the declaration was framed on a misfeasance, such verdict and judgment were not erroneous, and they were therefore affirmed in the Exchequer Chamber in error. *Bretherton* v. *Wood*, (*in error*,) T. 2 *G.* 4. *Page* 141

2. A carrier is bound to deliver a parcel at the place to which it is directed. Where therefore, a parcel of goods was directed to "Mr. *James Parker*, *High Street*, *Oxford*," who, on being applied to, said that he expected no such parcel, and it was afterwards delivered to a person who called at the defendant's office, claiming it as his, and who paid the carriage for it:—Held, that it was properly left to the Jury whether, under the circumstances, the

carrier had been guilty of gross negligence; and they having found that he had, the Court refused to grant a new trial, which was moved for on the grounds, first, that the plaintiff had corresponded by letters with the defendants after the loss, requesting him to apprehend the person to whom the parcel had been delivered as a swindler; secondly, that intimation of the value of the parcel was not given to the defendant at the time it was delivered at his office, according to a notice which was there affixed, limiting his responsibility to 5*l.* except the value of the parcel was specified when delivered; and lastly, that the property in the goods contained therein had passed from the plaintiffs to the consignee. *Duff* v. *Budd*, H. 2 & 3 *G.* 4.

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CHARTER-PARTY.

1. By a charter-party to government for transporting emigrants from this country to the *Cape of Good Hope*, the defendant, a ship broker, on behalf of the owners, let a vessel to the Commissioners of the navy, for the space of —— calendar months certain, and thenceforward until they should give him notice that she was discharged, such notice to be given after her return to *Deptford* or *Portsmouth*; and the Commissioners covenanted to pay freight at the rate of 14*s.* *per* ton *per* calendar month, for so long time as the vessel should be continued in his Majesty's service; and that after she had been in such service six months, the defendant should have a bill of imprest for two months freight more; and after ten months a like bill for two months; and a like bill whenever eight months should be due; and the following memorandum was written in the margin:—"Notwithstanding it is herein agreed that the ship shall be discharged at *Deptford* or *Portsmouth*, it is hereby covenanted, that she shall be discharged at the *Cape of Good Hope*, when the service will admit of it:"—Held, that under the terms of the charter-party, the voyage was general, and that the ship was chartered for an indefinite period, and that the defendant was only entitled to claim commission as for a voyage of that description, and not for a specific voyage outwards. *Holl* v. *Pinsent*, M. 2 *G.* 4. *Page* 228

2. Where a cargo consisting of oranges had been materially damaged through the improper conduct of the captain, who was also a part-owner of the vessel, and the freighters brought an action on the case against him and his co-part-owners for negligence in the conveyance of the goods:—Held, that such action was well brought, although the captain had entered into a charter-party under seal with the freighters, by which he engaged to convey the cargo to its port of destination; it not appearing from that instrument that he possessed any other character or interest than that of commander or master. *Leslie* v. *Wilson*, M. 2 *G.* 4. 415

CLERK OF COURT.

See OFFICER, 2.

CLERK OF THE DOCKETS.

See OFFICER, 1.

CLERK OF THE PEACE.

See OFFICES, 1.

COACH PROPRIETOR.

See CARRIER, 1.

COASTERS.

See PILOTS.

COLLECTOR OF TAXES.

See EVIDENCE, 3.

COMMISSIONER.

See INCLOSURE ACT.
RECOVERY, 4.

CONSIDERATION.

See ANNUITY, 2.
FRAUDS, STATUTE OF.

CONSIGNMENT.

See CARRIER, 2.

CONSOLIDATION RULE.

See INSURANCE, 6.

CONTINGENT REMAINDER.

See DEVISE, 6.

CONTINUANCE.

See BANKRUPT, 5.

CONTRACT.

See FRAUDS, STATUTE OF.
SHIP.

CONVEYANCE.

See DEVISE, 4. 6.
OFFICES.
STAMPS, 1.

COSTS.

See AMENDMENT, 1. 3.
EJECTMENT, 1.
WARDEN OF THE FLEET.

1. In order to discharge a plaintiff out of custody, who is in execution for costs, it must appear that such costs were paid on his account; where therefore, a plaintiff was in execution for costs arising to a magistrate from a verdict in an action for false imprisonment, an affidavit, stating that they had been paid to the latter by the Treasury, was held insufficient. *Butt* v. *Conant*, T. 2 *G.* 4. *Page* 65

2. Where the Prothonotary, on the taxation of costs, allowed for various sums expended in experiments, and a compensation for loss of time to scientific and professional men employed in making them, with a view to ascertain the increased risk or advantage in a new process of boiling sugar by means of heated oil, and who were called as witnesses at the trial; the Court directed him to review his taxation, on the ground that no such allowance or compensation ought to be made.

   Where the plaintiffs brought four actions against two insurance companies, for a loss by fire, and a verdict was found for the former against each company on two of the causes only: Held, that costs were to be apportioned equally, although three causes only were set down for trial at the same Sittings, there being a demurrer pending in the other. *Severn* v. *Olive*. *Same* v. *Slade*, M. 2 *G.* 4. 235

3. Where the plaintiff's cause of action is altogether denied by the defendant's pleas, and at the trial the plaintiff obtains a verdict on some issues, and the defendant on others, the plaintiff is entitled to the costs of the issue found for him, which include the general costs of the trial, but not the costs of the issues found for the defendant, on which however the latter is not entitled to claim any costs from the plaintiff; but where the defendant suffers judgment by default as to some causes

of action, and pleads as to others, and the plaintiff takes issue on the pleas, and at the trial all the issues are found for the defendant, the latter is entitled to the costs of the issues found for him, and the plaintiff to those only of the judgment by default. Where therefore, to an action of trespass, the defendant pleaded the general issue to the whole declaration, and several special pleas as to part, and the plaintiff new assigned, and the defendant suffered judgment by default as to the new assignment, and the plaintiff was bound to go to trial to get rid of the general issue, which would otherwise have barred his whole action, and he could not by any other means have obtained damages on the judgment by default:—Held, that the plaintiff was entitled to the general costs of the cause, including those of the trial, although the Jury found a verdict for the defendant on one of the special pleas, the costs of such issue being deducted, but not allowed to him on that issue. *House* v. *The Treasurer of the Thames and Isis Navigation*, M. 2 *G.* 4. *Page* 324

4. Where the plaintiff, an attorney, claimed 21*l.* from the defendant as his moiety of the expences for preparing a lease, and five years afterwards sued him for the recovery of that sum, and the defendant before the delivery of the declaration, took out a summons to stay proceedings on payment of 15*l.* and the costs then incurred, which the plaintiff refused to accept, but proceeded in the action by delivering a declaration, and the defendant pleaded the general issue, and paid 15*l.* into Court, which the plaintiff afterwards took out in full satisfaction of his demand; the Court refused to deprive him of the costs incurred between the obtaining the rule and the taking the money out of Court, there being nothing oppressive or vexatious in the plaintiff's conduct. *Carr* v. *Smythies*, M. 2 *G.* 4. *Page* 430

And see *Draper* v. *Neill*, 431, (n.)
Jones v. *Johnson*, 436, (n.)
Aspinall v. *Smith*, 436, (n.)

COVENANT.

See CHARTER PARTY.
INSURANCE, 1, 2.
LEASE.
SHIP.

CROSS REMAINDER.

See DEVISE, 1, 2.

CROWN DEBT.

See SHERIFF, 3.

DEBT.

See BOND.
PRACTICE, 9.

Debt does not lie for the arrears of an annuity issuing out of lands, and payable to the annuitant for life, although it is not stated in the declaration that the grantor had a freehold in the premises out of which it was payable, as it must be inferred that he had such an interest, where nothing appears to the contrary. *Kelly* v. *Chubbe*, M. 2 *G.* 4. 335

DEBTOR AND CREDITOR.

See INSOLVENT DEBTOR.
STAMPS, 1.
VARIANCE.

DECLARATION.

See AMENDMENT, 3.
BILLS OF EXCHANGE, 2.
EJECTMENT, 2.
INSOLVENT DEBTOR, 2.
INSURANCE, 1.
PLEADING, 1.

DEED.

See STAMPS, 1, 2.
VARIANCE.

1. In an action for the use and occupation of premises, against the assignees of a bankrupt:—Held, that the deed of assignment of the bankrupt's effects produced by the defendants at the trial, under a notice from the plaintiff so to do, was admissible in evidence, without proof of the execution by the subscribing witness, as it appeared that two of the assignees had continued to occupy the premises after the act of bankruptcy, and thereby claimed a beneficial interest under the deed. *Orr* v. *Morice*, M. 2 *G.* 4. *Page* 347

2. Where a deed purported to bear date on the 20th *November*, and was executed by one of two defendants on the 16th of that month, and by the other on a previous day:—Held to be immaterial, it not appearing that a blank was left for the date at the time of the execution. *Cockell* v. *Gray*, H. 2 & 3 *G.* 4. 483

DEMAND.

See TROVER.

DEMISE,

See STAMPS, 2, 3.

DEMURRER.

See PLEADING, 3.

DESCENT.

See LIMITATIONS, STATUTE OF, 2.

DEVIATION.

See INSURANCE, 4.

DEVISE.

1. Devise of an estate at *Irchester*, to devisor's grand-daughter *A.* for her life; remainder to two trustees during the life of *A.*, in trust only, to support contingent estates; and after her decease, to all and every the children in tail, with cross remaiuders between them in tail: and in default of issue of all and every the children of the devisor's grand-daughter, he devised to his daughter *B.* for life; remainder to such one or more of the children of *B.* as she by deed or will attested by three witnesses duly executed, should appoint, for their lives; remainder to all and every the child and children of such daughter or daughters, to be appointed by *B.* as aforesaid; and if only one should be appointed, then to her and the heirs of her body; and if more than one should be appointed, then all of them to take their mother's shares *per stirpes*, as tenants in common, and not as joint tenants; with cross remainders between them (the children of such daughters), as to their mother's shares in tail; and on failure of such issue of any one or more of such daughters, with cross remainders to the others of their issue; and in default of such appointment, and if any appointment not exhausting the whole fee, the devisor gave the estate at *Irchester*, or so much of the fee as should not be exhausted by such appointment made as

aforesaid, to *B.* for life; with remainder to all her daughters for their lives, with cross remainders between them for life; with remainder during the lives of all the daughters of *B.*, and the life of the survivor, to support contingent remainders; and for default of issue of any or either of the daughters then living of *B.* he devised the said estate to *B.* and her heirs.

A. died sole and intestate, leaving *B.* her heir at law, as well as the heir at law of the devisor. *B.* had issue nine daughters, many of whom were married and had issue:—Held, first, that *B.* had in the freehold and copyhold lands of the devisor an estate for her life, with an ultimate reversion to herself in fee. Secondly, that in default of appointment, her daughters then living had respectively, in the said lands of the testator, estates for life in remainder, as tenants in common, with cross remainders amongst themselves for life, with remainders to themselves in tail respectively. Thirdly, that in default of appointment, the grand-daughter of *B.* had no estate in the testator's said lands. Fourthly, that *B.* had power by appointment to designate which one or more than one of her daughters was or were to take under the will; that if one daughter only was designated, she would take under the will in tail; but if more than one was designated, they would take under the will as tenants in common for life, with remainder to their respective children as tenants in common in tail, with cross remainders between them (the said appointed daughters); and cross remainders to take place as well with regard to the shares of their respective mothers, as with regard to the shares of their aunts, in the event of a failure of issue of any of the aunts. *Medlycott* v. *Jortin*, T. 2 *G.* 4. *Page* 1

2. Devise to three trustees, of all the testator's freehold, leasehold, copyhold, and personal estate, in trust, after payment of legacies and annuities, which annuities he directed to be paid out of bank stock standing in his name, to pay all the rents, issues, profits, and produce of the residue of his estate and effects, as well real as personal, to his three nieces *E. M.* and *C.*, share and share alike, for their lives, and after their decease, or either of them, that their lawful issue should have his or her mother's share of such rents, &c. for life; and if either of the nieces should die in the life-time of the others or other of them having no issue, the share of her or them so dying, to be equally divided between the survivors of his nieces for their respective lives, and afterwards by the issue of the survivors of such nieces:—and in like manner if all his nieces and their issue save one, should die without issue, then such one to have the whole for her life; and after her decease, the issue of such niece, if more than one, to enjoy the whole, share and share alike; and if but one, such one to enjoy the whole alone; to hold such parts as were freehold to them and each of them, their heirs and assigns as tenants in common, and not as joint tenants; and if but one, to such only one, his or her heirs and assigns for ever; and in case of all the nieces dying without issue, the whole to go to the devivor's next male heir of his name, to hold to him, his heirs and executors, in like manner.

The niece *M.* married *B. G.* who died leaving his wife and one son surviving; *C.* also married but had no issue.

Two of the trustees died, and a considerable surplus of the testator's personal estate remained after paying debts, legacies, and annuities:—Held, first, that the surviving trustee had the legal estate in fee-simple devised to the three trustees. Secondly, that the nieces took no legal estate in the freehold tenements. Thirdly, that the son of *G. B.* took no legal estate therein, nor would he at the death of the survivor of the three nieces. Fourthly, that if the devise had commenced with the words "all the rents, issues, and profits," and the passage before these words had been omitted, the three nieces would respectively have taken estates for life in the freehold tenements under the will, with cross remainders between them for life, in the event of one or two of them dying without issue; and lastly, that *G. B.* would, in the events as they then stood, have an estate tail in remainder in his mother's one undivided third part of the said freehold tenements, subject to be divested in part by the birth of other children of his mother, whether sons or daughters; and that he would have an estate tail in the whole of the freehold tenements, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born. *Murthwaite* v. *Jenkinson*, T. 2 *G.* 4. *Page* 13

3. Under this devise, "I do give to my son *Richard*, the perpetual advowson of *Husbands Bosworth*, in *Leicestershire*, and my manor of *Stanwick*, and all my lands in *Northamptonshire*:"—Held, that an estate for life only in the advowson passed to the devisee, although he was the incumbent of the living at the time the will was made, and one of the residuary legatees;—on the ground that the words "perpetual advowson," were only descriptive of the thing divided, and not as denoting the quantity of interest which the devisee was to take therein. *Pocock* v. *Lincoln* (*Bishop*) T. 2 *G.* 4. *Page* 159

4. A testator devised all his estates to *A. G.* and *T. G.* for one hundred years, upon certain trusts mentioned in his will, and subject thereto he devised them to his wife, during her widowhood, and to *H. P. W.* and *J. S.* and the survivor, and also to the heirs of such survivor of the two latter, on certain trusts therein also mentioned, to the use of divers persons for life and in tail: he then directed that the three latter trustees should out of the rents and monies, discharge all his debts, legacies, &c., and that if his personal estate should be insufficient to pay the same, they were to raise and charge the deficiency on the real estate before devised to them: he then declared that if his personal estate should be insufficient to raise and pay portions for his younger children, *A. G.* and *T. G.* should raise the same by sale or mortgage of the one hundred years term; and all the rest and residue of his real and personal estates, he devised to his wife, *H. P. W.* and *J. S.*, and the survivors and heirs of such survivor of the two latter, on certain trusts thereinafter also mentioned. Then followed a power of sale, in which the testator stated that "whereas the moiety of several estates had

descended to him as one of the heirs at law of the late Mrs. *B. A.*; and whereas it might be convenient to sell any or all of them, either for the portions of his younger children or otherwise, or to divide or proportion the said estates, or any part of them: he thereby empowered *his said trustees* to sell or divide and proportion all or any of the said estates, and that their acts should be valid to all intents, so that the monies arising by the sale of all or any of the said estates, were kept and preserved, and remain and enure to and for the several uses and trusts directed by his will;" and the testator then nominated and appointed his wife, *H. P. W.* and *J. S.* the joint and sole guardians of all his children, and fully and wholly to execute his will, in trust as therein-before directed. The testator died, leaving his wife, *H. P. W.* and *J. S.* surviving, who proved the will. *J. S.* afterwards died, leaving the testator's widow and *H. P. W.* his co-executors, who afterwards, by indentures of lease and release, conveyed the moiety of one of the testator's estates to a purchaser in fee:—Held, that such conveyance was a good execution of the power for sale, given by the will of the testator. *Smith Leigh*, M. 2 *G.* 4. *Page* 214

5. The testatrix, as for her temporal estates and effects, gave and disposed of the same in the manner following, *viz.* she *bequeathed* to *L. C.* 4*l.* and to *M. H.* 3*l.*, which legacies she directed to be paid by her executor within three months after her decease; also she gave, *devised*, and bequeathed to *I. G.* all her lands, tenements, and hereditaments, particularly those called *B.* and *C.* situate in *P.*, which were lately the lands of her husband, and all the rest and residue of her goods and chattels, personal and *testamentary estate and effects* whatsoever, she *gave and bequeathed* to the said *J. G.*, whom she appointed sole executor of her will:—Held, that *J. G.* took a fee in the lands of *B.* and *C.* it being the intention of the testatrix, as collected from the will, to dispose of all of her property; and that the words "testamentary estate," in the residuary clause, connected with those of "temporal estates" in the introductory clause, were sufficient to convey such an estate, although the clause devising the lands, would give him an estate for *life* only. *Doe*, d. *Penwarden* v. *Gilbert*, M. 2 *G.* 4. *Page* 268

6. Where a testator was possessed of considerable personal property, and seised of an undivided third part in certain messuages and lands under a devise for lives, devised the latter and all his real estate to his sister and nephew for their joint lives, and to the survivor of them during her or his life, in case there should be no lawful issue living of them, or either of them, but in case both or either of them should leave any such issue, then to the survivor of the sister and nephew one undivided moiety only of the said real estate, for and during her or his life, and the rents and profits of the other undivided moiety to be paid and applied to the maintenance and education of all and every the child and children of either of them, the sister and nephew so dying, during their several minorities; and after the death of such survivor of the sister and nephew, the remaining moiety of the said estate was to be paid

and applied in like manner, if there should be occasion, to all and every the child and children of such survivor of the sister and nephew, during their several minorities; and *when and as* such several children of the sister and nephew respectively, (if any such there should be) should respectively attain their age of twenty-one, then the whole of the said real estate was devised unto and equally amongst all such children of the sister and nephew respectively, share and share alike, if more than one, as tenants in common, and to their respective heirs and assigns for ever; and if but one, to such only child, his or her heirs and assigns for ever; but in case the sister and nephew should both die without *leaving issue* of her or his body, or there being such issue, they should happen to die under twenty-one, and without issue, then the said estate was given to *G. M.*, his heirs and assigns for ever.

The nephew and sister being the testator's co-heirs at law, and the former having one daughter, and the sister being unmarried, for the purpose of destroying the contingent remainders expectant on their life estates, by merger of such life estates in the reversionary estate, as co-heirs, by bargain and sale conveyed the premises discharged from all the contingent interest devised by the will to the uses therein declared; that is to say, to such uses as they should jointly appoint; and in default thereof, upon such further uses for the benefit of the nephew and sister respectively, as were therein mentioned:—Held, first, that the daughter of the testator's nephew took upon the death of the testator and under his will, an estate in fee simple in remainder during the lives of the *cestui que vies*, in the undivided third part of the said messuages and lands comprised in the said indenture of demise, subject to be divested in part by the birth of other children of the nephew and sister, or of either of them, and determinable altogether in the event of her dying in the life-time of the nephew (her father), or under twenty-one, without leaving issue; secondly, that the conveyance did not pass any estate or interest which could in any way defeat or affect the remainder so vested in the daughter of the testator's nephew. *Machin* v. *Reynolds*, H. 2 & 3 *G.* 4.

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DISTRESS.

Goods of a principal in the hands of a factor for sale, are privileged from distress for rent due from such factor to his landlord; on the ground that the rule of public convenience, out of which the privilege arises, is within the exemption of a landlord's general right to distrain, and therefore that such goods are protected for the benefit of trade. *Gilman* v. *Elton*, M. 2 *G.* 4. 243

DIVORCE.

See BARON AND FEME, 2.

EJECTMENT.

See PRACTICE, 5.

1. In proceeding in ejectment under the statute 1 *Geo.* 4. *c.* 87. *s.* 1. the Court, on making a rule absolute (no cause being shewn) for the tenant's undertaking to give the plaintiff judgment, to be entered up against the real defendant, and to enter into a recognizance in a *reasonable sum*, conditioned to pay the costs and damages which should be reco-

vered by the plaintiff in the action;—ordered the tenant to appear in the next succeeding Term, to find such bail as were specified intheformer rule, and on no cause being shewn to that order, they directed the rule for entering up judgment for the plaintiff to be made absolute. The Court can only give a reasonable sum for the costs of the action, and not for the mesne profits; the amount of which must be ascertained by the Prothonotary. *Doe*, d. *Sampson* v. *Roe*, (*Templeman*, Tenant), T. 2 *G.* 4. *Page* 54

2. The lessor of a plaintiff who claims as heir at law, cannot compel a person to appear and plead to issue in an action of ejectment, without serving him with a copy of a declaration, although the premises were unoccupied, and a copy had been affixed on the outer door thereof. *Doe*, d. *Younghusband* v. *Roe*, H. 2 & 3 *G.* 4. 480

ENTRIES.

See EVIDENCE, 3.

ERROR, WRIT OF.

See AMENDMENT, 2.
CARRIER, 1.
PRACTICE, 10.

The defendant having suffered judgment by default in an action brought against him on bills of exchange, sued out a writ of error, after a rule to compute principal and interest:—Held, that the plaintiff could not take out execution without some express declaration either by the defendant or his attorney, that the writ of error was brought for delay, although the defendant had acknowledged the debt to be due before and since the commencement of the action. *Hamilton* v. *Schofield*, T. 2 *G.* 4. 45

ESCAPE.

See SHERIFF, 4.
WARDEN OF THE FLEET.

ESTATE IN FEE.

See DEVISE, 2. 5. 6.

ESTATE FOR LIFE.

See DEVISE, 1, 2, 3.

ESTATE TAIL.

See DEVISE, 2.

EVIDENCE.

See BILLS OF EXCHANGE, 1, 2.
FORGERY.
SHERIFF, 2.
STAMPS.

1. By a memorandum of adjustment indorsed on the back of a policy, it was stated that a particular average loss of 54*l. per cent.* had been settled between the plaintiff (an underwriter) and the defendant:—Held, that parol evidence was admissible to shew, that by a previous arrangement, it was agreed that if the other underwriters paid a less sum, the surplus should be repaid. *Russell* v. *Dunskey*, M. 2 *G.* 4. *Page* 233

2. In an action for the use and occupation of premises against the assignees of a bankrupt:—Held, that the deed of assignment of the bankrupt's effects produced by the defendants at the trial, under a notice from the plaintiffs so to do, was admissible in evidence, without proof of the execution by the subscribing witness, as it appeared that two of the assignees had continued to occupy the premises after the act of bankruptcy, and thereby claimed

a beneficial interest under the deed. *Orr* v. *Morice*, M. 2 *G.* 4. *Page* 347

3. In debt on bond against the surety of a deceased collector of taxes, conditioned for the due performance of his duty as such, and for delivering to the obligee all books and accounts entrusted to his care; a collecting book received by him from his predecessor, for the faithful delivery of which to the obligee, the defendant became surety; and on the death of the principal it was accordingly delivered to such obligee, containing the names of the parishioners residing within the parish for which the collector was appointed, and the sums at which they were rated, and the usual mark was made by him therein, opposite to some of such names, by which he indicated the receipt of the sums assessed on them;—and receipts signed by him for money paid to him in his official capacity, were produced and received in evidence against the surety on the execution of a writ of inquiry:—Held by the Court, on a motion whether they ought to have been admitted, that the entries made in such book were properly received as evidence at the trial, as it might be deemed a public book; but that the circumstances of the case did not warrant either an actual or implied authority by the surety, so as to admit the receipts of the principal as evidence against him. *Goss* v. *Watlington*, M. 2 *G.* 4. 355

4. Where in an action of debt on bond, it was sworn that the deponents had learned that the attesting witness kept out of the way to avoid an arrest:—Held, that this was not a sufficient reason for dispensing with the attendance of such subscribing witness, to prove the execution of the bond by the obligor, and evidence of his hand-writing having been given *aliunde*, on which the obligee obtained a verdict; the Court ordered a new trial. *Pytt* v. *Griffith*, H. 2 & 3 *G.* 4. *Page* 538

EXECUTION.

See COSTS, 1.
ERROR, WRIT OF.
VENDOR AND PURCHASER, 2,
WARDEN OF THE FLEET.

EXECUTOR.

See FRAUDS, STATUTE OF, 2.

1. Where a defendant is described in process generally, he may be declared against as executor or administrator; the object of the writ being merely to bring him into Court. *Watson* v. *Pilling*, T. 2 *G.* 4. 66

2. Where the plaintiff and *J. T.* were appointed co-executors, and the latter, at the time of the death of the testator, was in co-partnership with the defendant until it was discontinued, after which, and before any adjustment of the accounts of the firm, *J. T.* died, leaving the plaintiff his co-executor him surviving; and *J. T.* during the partnership, had paid large sums belonging to the testator's estate into the partnership account, and of which a separate account was kept in the partnership books to the credit of the testator's estate; and none of the funds of such estate ever came to the plaintiff, but were received by the partnership from *J. T.* his co-executor, without the knowledge of the plaintiff, and the house of *J. T.*, and the defendant became insolvent, and at the dissolution of the partnership

there appeared on the books a credit to the testator's estate, no part of which was paid; and the plaintiff, the surviving co-executor of *J. T.* having commenced an action for money had and received, and declared in his own right, and not as executor, against the defendant, in his own right, and not describing him as the surviving partner of *J. T.*:—Held, that such action could not be maintained, as the fact of the plaintiff's being such surviving co-executor should have been stated in the declaration. *Fitzgerald* v. *Boehm*, M. 2 *G.* 4. *Page* 332

EXTORTION.

See SHERIFF, 3.

FACTOR.

See DISTRESS.

FINE.

1. The certificate of a notary, of the acknowledgment of a fine taken abroad, must be written on parchment; and a literal translation of it engrossed on parchment, and referring to the original will not supply the defect. *Randall*, Plaintiff; *Lowring*, Deforciant, M. 2 *G.* 4. 232
2. On motion to amend a fine, an affidavit must be produced, stating that the possession had followed such instrument since it was passed. *Bisgood*, Demandant. M. 2 *G.* 4. 259
3. If documents for passing a fine be mislaid in the cursitor's office, the Court will allow it to pass, although one of the conusors be dead, and the acknowledgment was taken more than twelve months before the application was made; on an affidavit stating the time of the death of such conusor. *Fitchley*, Plaintiff; *Jervis*, Deforciant, M. 2 *G.* 4. 315
4. If the caption of a fine abroad be stated to have been taken before *A.* and *B.*, and the affidavit of such caption states that it was taken before *A.* and *C.*; the Court will not permit such fine to pass. *Maidment*, Plaintiff; *Proctor*, Deforciant. H. 2 & 3 *G.* 4. *Page* 517
5. If a parish be misdescribed by name in a fine and deed to lead the uses, the former may be amended by substituting the right name, if the deed contains general words under which the premises in such parish may pass. *Anon.* H. 2 & 3 *G.* 4. 520

FIRE—INSURANCE AGAINST.

See INSURANCE, 1, 2.

FORGERY.

Upon an indictment for forging and altering a forged acceptance to a bill of exchange in payment for goods which the prisoner had promised to pay for by an acceptance of a *London* banker; the bill was addressed to, and purported to be accepted by "Messrs. *Williams & Co.*, Bankers, 3, *Birchin Lane, London*," and it was proved that Messrs. *Williams, Burgess & Co.*, Bankers, of No. 20 in that lane, had not accepted the bill; and that there were no other bankers of that name in *London*; but there was no evidence to shew that Messrs. *Williams & Co.* of 3, *Birchin Lane*, had not done so:—Held, that this did not amount to a proof of forgery against the prisoner.

A bill of exchange was addressed to and purported to be accepted by "Messrs. *W. & Co.* Bankers, *Birchin Lane*," and in the corner at the foot of the address to them, the figure "3" was written in a small character, but it was not proved that it was on the bill at the time of its being uttered or dishonoured. On an

indictment for forgery, professing to set out the bill in terms, the figure "3" was inserted as it appeared on the bill when it was produced at the trial:—*Quære*, whether this was a variance? *The King* v. *Watts*, H. 2 & 3 *G.* 4. *Page* 442

See also *The King* v. *Webb*, 447, (n.)

FORMEDON.

See LIMITATIONS, STATUTE OF, 2.

FRAUD.

See FORGERY.
PLEADING, 3.

FRAUDS, STATUTE OF.

1. The defendant addressed the following letter to the plaintiffs, which he dated and signed:—"To the amount of 100*l.* consider me as security on *J. C.*'s account:"—Held, that it was not a sufficient memorandum to bind the defendant under the statute 29 *Car.* 2. *c.* 3. *s.* 4. the consideration or promise for the undertaking not having been expressed in such letter. *Jenkins* v. *Reynolds*, T. 2 *G.* 4. 86

2. Where the defendant agreed to purchase a lot of trees for a certain sum, and pay for the same according to conditions of sale, and afterwards felled and carried away part of them without making such payment, and refused to pay until the remainder had been delivered:—Held, that the executors of the vendor having failed to establish a count on the special contract, might recover the value of the trees taken by the defendant, under counts for goods sold and delivered, as the defendant by such taking, had disaffirmed the entirety of the contract. *Bragg* v. *Cole*, T. 2 *G.* 4. 114

3. The defendant gave the following note to the plaintiffs, which he dated and signed:—"I hereby guaranty the present account of Miss *H. M.* due to *R. T. S. & Co.* (the plaintiffs), of 112*l.* 4*s.* 4*d.* and what she may contract from this date to the 30th *September* next":—it seems that the consideration sufficiently appeared on the face of the instrument, to bind the defendant under the 29 *Car.* 2. *c.* 3. *s.* 4. *Russell* v. *Moseley*, H. 2 & 3 *G.* 4. *Page* 521

FREIGHT.

See CHARTER PARTY.
INSURANCE.
SHIP.

GENERAL ISSUE.

See BANKRUPT, 4.
COSTS, 3.

GOODS SOLD AND DELIVERED.

See FRAUDS, STATUTE OF, 2.

GRANT.

See ANNUITY.

GUARANTIE.

See FRAUDS, STATUTE OF, 1, 3.

HABEAS CORPUS.

See WARDEN OF THE FLEET.

HAND-WRITING.

See BOND.
EVIDENCE, 4.

HEIR.

See EJECTMENT, 2.
LIMITATIONS, STATUTE OF, 2.

HUSBAND AND WIFE.

See BARON AND FEME.

HYPOTHECATION.

See INSURANCE, 5.

INCLOSURE ACT.

Where under a local inclosure act, three Commissioners and their successors were nominated and

to do so within a reasonable time: where therefore, the assured, four days after a notice of abandonment had been given, called a meeting of the underwriters at *Lloyd's*, three of whom attended, and authorized the assured to act as if no assurance had been effected, and the damaged wines were accordingly advertised for sale; but previous to its taking place, some of the underwriters forbad it, and rejected the notice of abandonment after more than two months had elapsed, during which time they had not interposed:—Held, that their silence for so long a time was such an acquiescence by them as to amount to an acceptance of the abandonment, and that they could not afterwards prevent the sale. *Hudson* v. *Harrison*, M. 2 *G.* 4. *Page* 288

4. On a policy of assurance on ship and goods "at and from *Cuba* to *Liverpool*, with liberty in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, and with leave to discharge and take in at any ports or places she might call at, without prejudice to that insurance"; the assured, after the subscription of the policy, inserted in the body of it the words "with leave to call off *Jamaica*," which was acquiesced in by all the underwriters except the defendant, without increase of premium:—Held, that this was a material alteration, and avoided the policy as against the defendant.

Where a ship sailed on her outward voyage from *Liverpool* to *Cuba*, with a crew of thirteen men, and on her arrival at the latter place, three had died, and two deserted there, and the captain could only procure eight men for the whole of the homeward voyage, and two for *Montego Bay*, in *Jamaica*, (ten men being a competent crew to navigate the vessel), and he accordingly touched at *Montego Bay*, for the sole purpose of landing those two men and procuring others in their stead, which he did, and the vessel was lost by the perils of the sea in proceeding from thence on the voyage to *Liverpool*:—Held, that on a policy from *Cuba* to *Liverpool*, the ship was not sea-worthy as to her crew for the whole of her homeward voyage, when she sailed from *Cuba*; or that even if she then had a sufficient crew, the touching at *Montego Bay* was a deviation, and that the circumstance of her having become sea-worthy by having a sufficient crew at the time of the loss, did not entitle the assured to recover against an underwriter on the policy. *Forshaw* v. *Chabert*, M. 2 *G.* 4. *Page* 309

5. Where ship, freight, and passage-money, were insured for 13,000*l.* at and from *London* to the *East Indies*, and back, and the ship sailed sea-worthy from *Calcutta* on her homeward voyage, and afterwards received considerable damage by stormy weather, so as to render it necessary for the captain to put back there, and immediately on his arrival he gave notice of abandonment to the agents for *Lloyd's* resident there, and desired that their surveyor might be present at the surveys of the ship, and the agents replied that they had no authority to accept abandonments; and after three several surveys of the ship by competent persons, at two of which the surveyor for the agents attended, and it was found that

the expence of repairing her would be from 4000*l.* to 5000*l.*, and the captain having ineffectually attempted to raise money by hypothecation of the ship, (having no funds to repair her himself) sold her for 1200*l.*, and the Jury found that what had been done by him was for the benefit of all concerned, and gave a verdict for the assured as for a total loss: Held, that under the circumstances, the sale was justifiable, and the Court refused to grant a new trial.

Where the captain arrived in *London* on the 25th *April*, where his owner resided, and the latter received the ship's papers on the 3d *May* following, and the broker who affected the policy gave verbal notice of abandonment to the underwriters on the 5th:—Held, that such notice was given in due time. *Read* v. *Bonham*, M. 2 *G.* 4. *Page* 397

6. Where several underwriters entered into a consolidation rule to abide by the determination of the Court on a point reserved for their consideration at the trial of a cause, *viz.* as to whether a notice of abandonment had been given in due time:—the Court would not allow such rule to be opened, on an affidavit stating that the owner had received letters from the captain abroad, informing him of the loss and sale of the ship before the arrival of the latter in *London*; as notice should have been given to the plaintiff to produce such letters at the trial, or they should at all events have been adverted to by affidavit, when the motion was made to the Court on the point reserved. *Read* v. *Isaacs*, M. 2 *G.* 4. 437

7. Where indigo was insured upon a valued policy, at and from the loading port to the port of delivery, and the ship was sunk at the former port, in consequence of which the indigo was immersed in salt water, and after survey, was sold by public auction there, at a loss of 71*l. per cent.* and a verdict was found for the assured as for a total loss, subject to a reference to an arbitrator to ascertain the amount of such loss, who awarded a loss of 41*l.* 15*s.* 10*d. per cent.* on the defendant's subscription:—The Court refused to set aside such award, although it appeared that the indigo had been dried by the purchasers at the loading port, and afterwards re-shipped by them in other vessels, and that on its arrival at the port of delivery it produced nearly as much as if it had received no injury whatever. *Hardy* v. *Innes*, H. 2 & 3 *G.* 4. *Page* 574

INTERLINEATION.

See INSURANCE, 4.

INTERLOCUTORY JUDGMENT.

See PRACTICE, 9.

INVENTION.

See PATENT.

IRISH TRADER.

See PILOTS.

ISSUE.

See DEVISE, 2.

JOINDER OF PARTIES.

See ACTION ON THE CASE. CARRIER, 1.

JUDGMENT.

See CARRIER, 1.

LANDLORD AND TENANT.

See DISTRESS.
EJECTMENT.
LEASE.
STAMPS, 2, 3.

LEASE.

See STAMPS, 3.

Where a lease contained two clauses for re-entry, the one in case the yearly rent of 300*l.* was in arrear thirty days after it became payable; and the other in case the yearly rent were in arrear, which was stated to be payable half-yearly at *Lady-day* and *Michaelmas*:—Held, that the landlord had a right to re-enter on non-payment of each half year's rent, as the former clause contained the description of the amount to be annually paid, and the latter the times of payment. *Doe*, d. *Rudd* v. *Golding*, M. 2 *G.* 4. *Page* 231

LEVARI FACIAS.

See SHERIFF, 3.

LIBEL.

See PRACTICE, 3.

LIMITATIONS, STATUTE OF.

1. Where in an action of trover, brought in C. P. to try the validity of a commission of bankrupt issued against the plaintiff by the defendant as his assignee, the latter produced an office copy of a roll in the Court of King's Bench, by which it appeared that an action was commenced there against the plaintiff and his partner more than six years before, and continuances brought down to the Term before the trial in C. P.:—Held, that the petitioning creditor's debt on which the commission was founded, was not barred by the statute of Limitations, for that as long as a remedy is open, by which the debt may be recovered any where, it does not fall within the operation of that statute. *Gregory* v. *Hurrill*, H. 2 & 3 *G.* 4. *Page* 525

2. The twenty years within which a *formedon in descender* must be brought under the statute 21 *Jac.* 1. *c.* 16. *s.* 1., begin to run when the title descends to the first heir in tail, and there is no distinction between the heir of a tenant in fee taking by descent, and the heir of a tenant in tail. *Tolson*, Demandant; *Kaye*, Defendant, H. 2 & 3 *G.* 4. 542

LORDS ACT.

See INSOLVENT DEBTOR, 3.

MEMORANDA, 213, 441.

MESNE PROFITS.

See EJECTMENT, 1.

MISFEASANCE.

See CARRIER, 1.

MISNOMER.

Upon error assigned of a *misnomer* of the christian name of one of the plaintiffs below in the warrants of attorney;—the Court of Exchequer Chamber held it to be immaterial. *De Tastet* v. *Rucker*, *in error*, T. 2 *G.* 4. 135

MONEY HAD & RECEIVED.

See EXECUTOR, 2.

MONTH.

See VARIANCE.

NEGLIGENCE.

See CARRIER.
CHARTER PARTY, 2.
SHIP.

NEW ASSIGNMENT.

See COSTS, 3.

NEW TRIAL.

See BOND.
CARRIER, 2.
INSURANCE, 5.

NOTICE OF BAIL.

See BAIL.

To dispute Bankruptcy.—*See* PRACTICE, 7.
Of Carrier—*See* CARRIER, 2.

OFFICER.

See ARREST, 1.
SHERIFF.
WARDEN OF THE FLEET.

1. The clerk of the dockets is not entitled to poundage on money paid into Court by the sheriff under the statute 43 *Geo.* 3. *c.* 46. *s.* 2. *Hunn* v. *Brine*, T. 2 *G.* 4. *Page* 124

2. Where in an action on the case against an officer of the Insolvent Debtors Court, for improperly drawing up an order for the discharge of an insolvent, instead of his further imprisonment, the declaration alleged that such officer *wrongfully*, falsely, and unlawfully made and issued a certain order, purporting to be an order from the Court: Held, on general demurrer, that as it was throughout the declaration averred as purporting to be, and treated as an order, and had not been repudiated or rescinded by the Court itself, the action could not be maintained by a creditor of the insolvent against the officer for the discharge of the former out of custody under such order. *Whitelegg* v. *Richards*, H. 2 & 3 *G.* 4. 501

OFFICES.

1. An assignment by deed to trustees, of all the income, emoluments, and profits, which during the life of the assignor, and his continuing to hold the office of Clerk of the Peace for *Westminster*, should arise or become due to him as such clerk in respect of his office, (after deducting the salary or allowance of his deputy for the time being), upon trust to pay interest, which should become due to *A.* and *B.* on certain debts due from the assignor to them, and from time to time render and pay the surplus and residue of the income, emoluments and profits, to the assignor, after satisfying the trusts, is not a good or effectual assignment, nor valid in law: and the trustees are not entitled to recover such income and profits under such assignment. *Palmer* v. *Bate*, T. 2 *G.* 4. *Page* 23

2. An assignment of the profits of all offices which the defendant might acquire, is good as to all those which may be legally assigned. The office of private secretary does not fall within the meaning of the statute 5 & 6 *Edw.* 6. *Harrington* v. *Kloprogge*, T. 2 *G.* 4. 38 (*a.*)

ORDER OF COURT.

See INSOLVENT DEBTOR, 2.
OFFICER, 2.
SHERIFF, 2.

OWNER OF SHIP.

See SHIP.

PARTICULARS OF DEMAND.

See PRACTICE, 3.

In future, defendants on being served with process, or arrested, will be allowed to obtain orders for the particulars of the plaintiff's demand, without waiting till appearance entered, or bail put in, or declaration filed and delivered; and in this respect, the practice of this Court will be made conformable to that of the Court of King's Bench. *Rule of Practice*, T. 2 *G.* 4. 211

PARTNERS.

See EXECUTOR, 2.

Where the plaintiffs, as indorsees of a bill of exchange, sued the drawer in their own right, and it appeared that the bill had been indorsed to them in blank, before the death of one of the firm who was a partner with the plaintiffs as bankers:—Held, that the action was well brought without describing themselves as surviving partners in the declaration, as they were not bound to prove the partnership, or that the bill was indorsed or delivered to them jointly with their deceased partner. *Secus*; if the bill had been specially indorsed. *Attwood* v. *Rattenbury*, H. 2 & 3 *G.* 4.
Page 579

PART-OWNER.

See SHIP.

PATENT.

Where a patent was obtained for "a new and improved method of making and manufacturing double canvass and sail cloth with hemp and flax, without any starch whatever," and the specification described the invention to consist in an improved texture or mode of twisting the threads, to be applied to the making of unstarched cloth;—on its being proved at the trial that the exclusion of starch had been before adopted:—Held, that such patent was void, as being taken out for more than the patentee had really discovered. *Campion* v. *Benyon*, T. 2 *G.* 4. 71

PAYMENT OF MONEY INTO COURT.

See COSTS, 4.

The clerk of the dockets is not entitled to poundage on money paid into Court by the sheriff, under the statute 43 *Geo.* 3. c. 46. *s.* 2. *Hunn* v. *Brine*, T. 2 *G.* 4.
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PENALTY.

See ATTORNEY.

PETITIONING CREDITOR'S DEBT.

See BANKRUPT, 5.

PILOTS.

An *Irish* vessel with a general cargo, trading between *Belfast* and *London*, and not laden with corn or grain, as specified in the 46 *Geo.* 3. c. 97. *s.* 2. is not exempted under the 52 *Geo.* 3. c. 39. *s.* 2. from taking a pilot on board;—as such vessel cannot be considered as a coasting vessel or an *Irish* trader, using the navigation of the river *Thames* as a coaster. *Davison* v. *Mekibben*, M. 2 *G.* 4. 387

PLEADING.

See AMENDMENT, 3.
BILLS OF EXCHANGE, 1, 2.
CARRIER, 1.
COSTS, 3.
DEBT.
EXECUTOR.
FORGERY.
FRAUDS, STATUTE OF, 2.
INSOLVENT DEBTOR, 2.
MISNOMER.
OFFICER, 2.
SHERIFF, 2.
VARIANCE.

1. Where a defendant is described in process generally, he may be declared against as executor or administrator, the object of the writ being merely to bring him into Court. *Watson* v. *Pilling*, T. 2 *G.* 4. 66

2. Where a defendant in an action brought against him by the assignee of a bankrupt, pleaded the general issue, without giving notice of his intention to dispute the bankruptcy, he may, under a Judge's order, have leave to withdraw such plea and plead *de novo*, with the notice required by the 49 *Geo.* 3. *c.* 121. *s.* 10. *Gardner* v. *Slack*, H. 2 & 3 *G.* 4. *Page* 489

3. A defendant cannot withdraw a general demurrer and plead specially, unless a full and reasonable cause be shewn for his so doing. Therefore, where to a declaration on a replevin bond, the principal and sureties demurred generally, and the former had confessed a judgment in the original action, the Court would not allow one of the sureties to withdraw his demurrer and plead *per fraudem*, unless fraud were expressly shewn. *Elworthy* v. *Cowell*, H. 2 & 3 *G.* 4. 495

POLICY.

See EVIDENCE, 1.
INSURANCE.

POUNDAGE.

See OFFICER, 1.
SHERIFF, 2.

POWER.

See DEVISE, 1. 4.

A testator devised all his estates to *A. G.* and *T. G.* for one hundred years, upon certain trusts mentioned in his will, and subject thereto, he devised them to his wife during her widowhood, and to *H. P. W.* and *J. S.* and the survivor, and also to the heirs of such survivor of the two latter on certain trusts therein also mentioned, to the use of divers persons for life and in tail; he then directed that the three latter trustees should, out of the rents and monies, discharge all his debts, legacies, &c. and that if his personal estate should be insufficient to pay the same, they were to raise and charge the deficiency on the real estate before devised to them: he then declared that if his personal estate should be insufficient to raise and pay portions for his younger children, *A. G.* and *T. G.* should raise the same by sale or mortgage of the one hundred years term; and all the rest and residue of his real and personal estates, he devised to his wife *H. P. W.* and *J. S.*, and the survivors and heirs of the two latter, on certain trusts thereinafter also mentioned.—Then followed a power of sale, in which the testator stated that "whereas the moiety of several estates had descended to him as one of the heirs at law of the late Mrs. *B. A.*; and whereas it might be convenient to sell any or all of them, either for the portions of his younger children or otherwise, or to divide or proportion the said estates, or any part of them; he thereby empowered *his said trustees* to sell or divide and proportion all or any of the said estates, and that their acts should be valid to all intents, so that the monies arising by the sale of all or any of the said estates were kept and preserved, and remain and enure to and for the several uses and trusts directed by his will;" and the testator then nominated and appointed his wife, *H. P. W.* and *J. S.* the joint and sole guardians of all his children, and fully and wholly to execute his will, in trust, as thereinbefore

directed.—The testator died, leaving his wife, *H. P. W.* and *J. S.* surviving, who proved the will. *J. S.* afterwards died, leaving the testator's widow and *H. P. W.* his co-executors, who afterwards by indentures of lease and release, conveyed the moiety of one of the testator's estates to a purchaser in fee:—Held, that such conveyance was a good execution of the power for sale given by the will of the testator. *Smith* v. *Leigh*, M. 2 *G.* 4. *Page* 214

PRACTICE.

See AMENDMENT.
ARREST.
ATTORNEY.
AWARD.
BAIL.
BARON AND FEME.
COSTS.
EJECTMENT.
ERROR.
LIMITATIONS, STATUTE OF, 1.
MISNOMER.
OFFICER, 1.
PARTICULARS OF DEMAND.
PLEADING.
RECOVERY.
REPLEVIN.
SCIRE FACIAS.
SHERIFF.
WARDEN OF THE FLEET.

1. Where an avowant in replevin carried down the issue to trial, without adding the *similiter* to the plea in bar, the Court set aside the verdict for irregularity, but without costs. *Griffith* v. *Crockford*, T. 2 *G.* 4. 51
2. If a verdict be found for the plaintiff with nominal damages, subject to the opinion of the Court on a special case to be drawn up by the plaintiff, if he refuses to do so, the case cannot be set down for argument, nor can the plaintiff be compelled to complete it; but the defendant may apply to set aside the verdict and have a new trial. *Medley* v. *Smith*, T. 2 *G.* 4. *Page* 53
3. In a joint action for a libel by three plaintiffs, the defendants may call on the attorney of one of them for an account of the residence or occupation of the others. *Worton* v. *Smith*, T. 2 *G.* 4. 110
4. The clerk of the dockets is not entitled to poundage on money paid into Court by the sheriff, under the statute 43 *Geo.* 3. *c.* 46. *s.* 2. *Hunn* v. *Brine*, T. 2 *G.* 4. 124
5. The Court will not refer it to the Prothonotary to take an account of monies received by the lessor of the plaintiff, in respect of annuities, or to ascertain the costs in an action of ejectment. *Doe*, d. *Johnson* v. *Roe*, M. 2 *G.* 4. 331
6. Where a parol submission was made by an infant plaintiff to a reference before trial, and an arbitrator made an award in favor of the defendant. On the plaintiff's refusing to comply with the terms of such award, the defendant may proceed to trial by proviso. *Godfrey* v. *Wade*, H. 2 & 3 *G.* 4. 488
7. Where a defendant in an action brought against him by the assignee of a bankrupt, pleaded the general issue, without giving notice of his intention to dispute the bankruptcy, he may under a Judge's order, have leave to withdraw such plea, and plead *de novo*, with the notice required by the 49 *Geo.* 3. *c.* 121. *s.* 10. *Gardner* v. *Slack*, H. 2 & 3 *G.* 4. 489
8. A defendant cannot withdraw a general demurrer and plead spe-

cially, unless a full and reasonable cause be shewn for his so doing. Therefore, where to a declaration on a replevin bond the principal and sureties demurred generally, and the former had confessed a judgment in the original action, the Court would not allow one of the sureties to withdraw his demurrer and plead *per fraudem*, unless fraud were expressly shewn. *Elworthy* v. *Cowell*, H. 2 & 3 *G.* 4. *Page* 495

9. Where the defendant had suffered judgment by default in an action of debt on bond, conditioned for the performance of covenants and payment of costs in Chancery, and afterwards filed a bill for an injunction:—Held, that although the plaintiffs delayed executing a writ of enquiry more than a year after interlocutory judgment was signed, it was not necessary to revive such judgment by *scire facias* before execution, as the defendant attempted to delay it by filing the bill for an injunction. *Powis* v. *Powis*, H. 2 & 3 *G.* 4. 517

10. Where in an action of trespass, the *venue* was laid in *Lancashire*, and the defendant suffered judgment by default, and after writ of inquiry executed, and final judgment signed, the defendant assigned error for want of an original writ, the Court ordered the plaintiff to docket and carry in the judgment roll, in order that the transcript might be made out. *Mason* v. *Grundy*, H. 2 & 3 *G.* 4. 567

PRINCIPAL AND FACTOR.

See DISTRESS.

PRINCIPAL AND SURETY.

See EVIDENCE, 3.
REPLEVIN BOND.

PRISONER.

See ATTACHMENT.
COSTS, 1.
INSOLVENT DEBTOR.
SHERIFF.

PROCESS.

See PLEADING, 1.

PROMOTIONS, 441.

PROTEST.

See BILLS OF EXCHANGE, 1.

PUBLIC BOOK.

See EVIDENCE, 3.

QUARE IMPEDIT.

See DEVISE, 3.

RECEIPT.

See EVIDENCE, 3.

RECOVERY.

1. The Court will not allow a recovery to be amended, by transposing the names of the demandant and tenant, unless the documents relative to its being suffered be produced. *Allen*, Demandant; *Hexley*, Tenant; *Massey*, Vouchee, T. 2 *G.* 4. *Page* 46

2. Nor will they permit a recovery to be amended by increasing the quantity of land, if the deed to lead the uses contains sufficient terms to shew that it was intended to pass; nor is it necessary that the exact admeasurement should be inserted in such deed. *Marryatt*, Demandant; *Elmore*, Tenant; *Shard*, Vouchee, T. 2 *G.* 4. 50

3. A recovery may be amended by substituting the word "advowson" for that of "rectory," if it appears by the deed to lead the

uses, that the former was intended to pass. *Haller*, Demandant; *Woolley*, Tenant; *Palmer*, Vouchee, T. 2 *G.* 4. *Page* 53

4. In a recovery where the vouchees resided in *Guernsey*, and the acknowledgment was taken before Commissioners there, who neglected to indorse their names on the *dedimus*:—The Court would not permit the recovery to pass, but ordered the documents to be returned to them for such indorsement. *Watts*, Demandant; *Milne*, Tenant; *Pickford*, Vouchee, T. 2 *G.* 4. 69

5. By a recovery suffered in 1759, premises were described as consisting of "a mill, lands and hereditaments in the parish of *M.*" By a deed of bargain and sale in 1771, "all the tithes and hereditaments, except in *M.* were conveyed," which it was stated were comprised in the recovery of 1759, and were accordingly omitted in the latter:—Held, that such tithes did not pass by the first recovery; but as it appeared that the tithes of all the vouchee's estates were intended to pass by the latter, except those which were supposed to have been included in the first; the Court permitted the latter to be amended by inserting the "tithes in *M.*" *Ward*, Demandant; *Palmer*, Tenant; *Coventry* (*Earl*), Vouchee, M. 2 *G.* 4. 224

6. A recovery may be amended by describing the premises to be situate "in the parish of *A.* in the city of *B.*, and in the parish of *C.*, in the county of the same city," according to the deed to lead the uses; although they were described in the exemplification of the recovery, as being situate in "the parishes of *A.* and *C.*, in the city of *B.*" *Bisgood*, Demandant; *Brutton*, Tenant; *Ivee*, Vouchee, M. 2 *G.* 4. *Page* 259

7. So, a recovery may be amended by inserting the words "the county of the," before those of "city of *C.*" on an affidavit stating that the premises intended to pass were situate in the county of that city, and so described in the deed to lead the uses, but by mistake described in the recovery as being in the city of *C. Hill*, Vouchee, M. 2 *G.* 4. 259, (n.)

8. On motion to amend a recovery, an affivavit must be produced, stating that the possession had followed such instruments. *Bisgood*, Demandant; *Brutton*, Tenant; *Ivee*, Vouchee, M. 2 *G.* 4. 259

RE-ENTRY.

See LEASE.

REFERENCE.

See AWARD.

REMAINDER.

See DEVISE, 1. 6.

RENT.

See DISTRESS.
LEASE.

REPLEVIN.

Where an avowant in replevin carried down the issue to trial without adding the *similiter* to the plea in bar, the Court set aside the verdict for irregularity, but without costs. *Griffith* v. *Crockford*, T. 2 *G.* 4. 51

REPLEVIN BOND.

Where to a declaration on a replevin bond, the principal and

sureties demurred generally, and the former had confessed a judgment in the original action, the Court would not allow one of the sureties to withdraw his demurrer, and plead *per fraudem*, unless fraud were expressly shewn. *Elworthy* v. *Cowell*, H. 2 & 3 *G.* 4. *Page* 495

RESIDUARY CLAUSE.

See DEVISE, 4.

RETURN OF WRIT.

See SHERIFF, 4.

RULES OF THE FLEET.

See WARDEN OF THE FLEET.

SALE.

See FRAUDS, STATUTE OF, 2.
INSURANCE, 3. 5.
STAMPS, 1.
VENDOR AND PURCHASER, 1. 2.

RULE OF PRACTICE, 211.

SCIRE FACIAS.

Where the defendant had suffered judgment by default in an action of debt on bond conditioned for the performance of covenants and payment of costs in Chancery, and afterwards filed a bill for an injunction:—Held, that although the plaintiffs delayed executing a writ of inquiry more than a year after interlocutory judgment was signed, it was not necessary to revive such judgment by *scire facias* before execution, as the defendant attempted to delay it by filing the bill for an injunction. *Powis* v. *Powis*, H. 2 & 3 *G.* 4. 517

SEA-WORTHINESS.

See INSURANCE, 4.

SHERIFF.

See ARREST.
OFFICER, 1.

1. Where a sheriff's officer, on arresting the defendant, took five shillings from him, with a promise to pay the remainder of what was usual at a future day, and allowed him to go at large without taking a bail-bond, without the plaintiff's assent, he cannot be surrendered in discharge of his bail; and an attachment having issued against the sheriff for not returning the writ, it cannot be set aside, nor will the Court relieve him by allowing him to put in and justify bail. *Collins* v. *Suggs*, T. 2 *G.* 4. *Page* 111

2. In an action against the sheriff for not arresting a defendant; proof of the indorsement of the officer's name on the writ, by a clerk in the under sheriff's office, is sufficient to connect such officer with the sheriff, and shew that the indorsement was made with his authority, without calling the officer himself, or producing the warrant under which he acted. *Francis* v. *Neame*, T. 2 *G.* 4. 120

And see *Bowden* v. *Waithman*, and *Fermor* v. *Phillips*, ante, vol. v. 183, 184, (n.)

3. In an action by the assignees of a bankrupt, founded on the statute 29 *Eliz.* c. 4. against a sheriff for extortion, on executing a *levari facias*, issued out of the Court of Exchequer for a crown debt:—Held, that that statute applied only to cases between party and party, and that the plaintiff's remedy was under the statute 3 *Geo.* 1. c. 15, which gives the plaintiff poundage in cases where the debt is due to the crown, previously to which he

was not entitled to such poundage, except under orders issued by that Court.—It seems that the taking a remuneration by the sheriff for extra expences incurred in dividing the property of a bankrupt into lots at his request, in order that it might sell to greater advantage, does not amount to an extortion. *Stephens* v. *Rothwell*, M. 2 G. 4. *Page* 338

4. Where the plaintiff assigned certain debts owing to him to a trustee, in trust for a third person, one of which was due from the defendant, and for which he was arrested, and whilst he was in custody of the sheriff, the plaintiff gave the latter notice that he had assigned the debt due from the defendant to him, and afterwards authorised the sheriff to discharge the defendant out of custody, the debt and costs being satisfied, and the trustee afterwards produced the assignment from the plaintiff to him at the sheriff's office, and ordered the sheriff not to discharge the defendant, but he did so, and on being ruled to return the writ, returned that he took the defendant and safely kept him in custody, until the plaintiff discharged him, whereupon he permitted him to go at large:—Held, that the sheriff could not afterwards be ruled to bring in the body of the defendant, as the plaintiff might have his remedy, if any, by an action for an escape, and that the party to whom the debt was assigned, should have indemnified the sheriff for keeping the defendant in custody at the time he gave him notice of the assignment. *Hookham* v. *Monckton*, H. 2 & 3 G. 4. 497

SHIP.

See CHARTER PARTY.
INSURANCE.
PILOTS.

The owners of a ship for whose benefit she is navigated, are bound to owners of goods shipped and received on board to be carried, for the due carriage thereof, and are liable for any negligence on the part of themselves or their servants, whereby such goods may be damaged, although in the due course of the ship's employment the master makes a charter-party under seal; because the ship owners are not charged directly upon the contract of charter-party, but upon their general liability as principals in the adventure, and deriving profit from the ship's employment. Where therefore, a cargo consisting of oranges had been materially damaged through the improper conduct of the captain, who was also a part owner of the vessel, and the freighters brought an action on the case against him and his co-part-owners, for negligence in the conveyance of the goods:—Held, that such action was well brought, although the captain had entered into a charter-party under seal with the freighters, by which he engaged to convey the cargo to its port of destination;—it not appearing from that instrument that he possessed any other character or interest than that of commander or master. *Leslie* v. *Wilson*, M. 2 G. 4. *Page* 415

SIMILITER.

See PRACTICE, 1.

SPECIAL CASE.

See PRACTICE, 2.

SPECIFICATION.

See PATENT.

STAMPS.

See BILLS OF EXCHANGE, 1.

1. By a deed of assignment, five persons conveyed all their crops, goods, and effects to trustees, in trust to sell, and with the proceeds to be produced by such sale, to discharge first debts due to the trustees, with interest from the date of the deed; then debts due to other creditors, with a resulting trust as to the residue to the parties conveying:—Held, that such deed did not require an *ad valorem* stamp, as upon a "conveyance" or "mortgage" under the statute 55 *Geo.* 3. *c.* 184. Sched. Part 1, as the former clause operates only as to actual sales between vendor and vendee; and that it fell within the exception in the latter, *viz.* "where such conveyance shall be made for the benefit of creditors generally;" and therefore that a common deed stamp was sufficient. *Coates* v. *Perry*, T. 2 *G.* 4. *Page* 188

2. An agreement between landlord and tenant, for the latter to give up the principal part of a farm to the former, who was to purchase the stock thereon at a valuation, and the tenant was to hold over half the house without paying rent, and deliver up the same at a subsequent day;—requires a surrender stamp under the 55 *Geo.* 3. *c.* 184. Sched. Part 1, as such agreement operates as a surrender of the term: Held, therefore, that an agreement stamp was insufficient. *Williams* v. *Sawyer*, M. 2 *G.* 4. 226

3. The plaintiff demised a slate pit at *S.* and stone quarries at *M.* to the defendant, under an indenture of lease, to hold the one from *Lady-day* 1815, and the others from *Michaelmas* 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate pit, and 130*l.* for the quarries:—Held, that all the premises might be demised by one indenture of lease, and that one *ad valorem* stamp on the aggregate amount, was sufficient under the 55 *Geo.* 3. *c.* 184, Sched. Part 1, tit. *Lease*, as the letting must be considered as one transaction, and there being no evidence of an intent by the parties to defraud the revenue. *Boase* v. *Jackson*, H. 2 & 3 *G.* 4. *Page* 480

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES—CITED OR COMMENTED ON.

Edward 1.

6. *c.* 1. Costs. 328

Henry 6.

8. *c.* 12. Amendment. 137

Henry 7.

4. *c.* 24. Fine. 548, 55

Henry 8.

32. *c.* 1. Will of Lands. 170
— *c.* 2. Limitation of Actions. 552, 6
34. *c.* 5. Wills. 170
37. *c.* 1. *s.* 3. Clerk of the Peace. Offices. 33

Edward 6.

5 & 6. *c.* 16. *ss.* 2, 3. Offices. 32, 4, 7, 8, 9, 41

Elizabeth.

18. *c.* 14. Jeofails. 138
29. *c.* 4. Sheriff. 338, 40, 1, 5

James 1.

21. *c.* 16. *s.* 5. Limitations—Tender of amends. *Page* 489
——— *ss.* 1. 3. Limitations. 527, 42, 8, 51, 8

Charles 2.

22 & 23. *c.* 9. Costs. 328
29. *c.* 3. *ss.* 4. 17. Frauds, Statute of. 86, 9, 90, 95, 9. 102, 5, 16
——— *s.* 4. Frauds. 521

William & Mary.

1. *stat.* 1. *c.* 21. *s.* 5. Clerk of the Peace—Offices. 33, 6
2. *sess.* 1. *c.* 5. Distress. 257

William 3.

8 & 9. *c.* 11. *s.* 4. Costs—Trespass. 326, 8, 30
——— *s.* 8. Bond — Assignment of Breaches. 350, 360

Anne.

4. *c.* 16. *s.* 19. Limitation of actions. 528

George 1.

3. *c.* 15. *s.* 3. Sheriff — Poundage. 338, 9, 343, 4, 6
——— *s.* 13. Sheriff — Extortion. 341

George 2.

2. *c.* 23. *s.* 24. Attorney. 70
— *c.* 36. Ship—Seamens' Wages. 393
4. *c.* 28. *s.* 4. Ejectment — Rent. 331
11. *c.* 19. Landlord and Tenant—Distress. 257

George 3.

xxviii. *c.* li. *s.* iii. *Thames Navigation.* 324
31. *c.* 39. Ship—Seamens' Wages. 393
41. *c.* 109. General Inclosure Act. 533
43. *c.* 46. *s.* 2. Bail to the Sheriff—Costs. 124, 7
46. *c.* 97. *s.* 2. Exportation—Corn. *Pages* 387, 8, 9. 93, 4, 5, 6
48. *c.* 123. Insolvent Debtors. 287
49. *c.* 121. *s.* 10. Bankrupt—Notice to dispute Commission. 480
52. *c.* 39. *ss.* 2. 34. Pilot Act. 387, 8, 9. 93, 5, 6
53. *c.* 141. *s.* 6. Annuity. 492, 3
55. *c.* 184. (Schedule, Part 1.)—Stamps. 188, 92, 3, 6, 7. 226, 7. 480, 1.

George 4.

1. *c.* 87. *s.* 1. Ejectment—Landlord and Tenant. 54, 6
— *c.* 119. Insolvent Debtors' Act. 506

STAYING PROCEEDINGS.

See COSTS, 4.

SUBSCRIBING WITNESS.

See BOND.
DEED, 1.

SURETY.

See ANNUITY, 2.
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SURRENDER.

See STAMPS, 2.

TAXATION OF COSTS.

See COSTS, 2.

TAXES, COLLECTOR OF.

See EVIDENCE, 3.

TENANTS IN COMMON.

See DEVISE, 1. 6.

TENANT IN FEE.

See LIMITATIONS, STATUTE OF, 2.

TENANT IN TAIL.

See LIMITATIONS, STATUTE OF, 2.

TIME, COMPUTATION OF.

See VARIANCE.

TITHES.

See RECOVERY, 3.

TRADER.

See BANKRUPT, 1.

TRANSCRIPT.

See AMENDMENT, 2.
PRACTICE, 10.

TRESPASS.

See COSTS, 3.
PRACTICE, 10.

TRIAL BY PROVISO.

See PRACTICE, 6.

TROVER.

See BANKRUPT, 2.
VENDOR AND PURCHASER, 2.

Where a bankrupt was required by his assignees on his last examination to deliver to them his books of account, which he did:—Held, that he must be deemed to have delivered them on compulsion; and it being afterwards found that he was not a trader, and that a commission had improperly issued, that he might support an action of trover against such assignees, without any previous demand of the books. *Summersett* v. *Jarvis*, T. 2 *G.* 4. *Page* 56

TRUSTEE.

See ANNUITY, 2.
DEVISE, 2. 4.
INSURANCE, 2.
OFFICES, 1.
SHERIFF, 4.
STAMPS, 1.

UNDERWRITER.

See EVIDENCE, 1.
INSURANCE.

USE AND OCCUPATION.

See DEED, 1.

VARIANCE.

See FORGERY.

Where the defendants became sureties in a composition deed, by which the debtors covenanted to pay their creditors by certain instalments, within sixteen months from the date thereof, viz. two shillings in the pound within four calendar months, a like sum within eight calendar months, a like sum within twelve calendar months, and the fourth or last instalment within sixteen calendar months; and on the record it was stated, that the creditors were to receive their four respective instalments on or before the expiration of sixteen *calendar* months from the date thereof, but the instalments were alleged to be payable within four, eight, twelve, and sixteen months generally, omitting the word "calendar;"—Held, that this was no variance, as the deed clearly shewed that the parties meant calendar months. *Cockell* v. *Gray*, H. 2 & 3 *G.* 4. *Page* 483

VENDOR AND PURCHASER.

See STAMPS, 1.

1. Where the defendant agreed to purchase a lot of trees for a certain sum, and pay for the same according to conditions of sale, and afterwards felled and carried away part of them without making such payment, and refused to pay until the remainder had been delivered:—Held, that the executors of the vendor having failed to establish a count on the special contract, might recover the value of the trees taken by the defendant under counts for

goods sold and delivered, as the defendant by such taking had disaffirmed the entirety of the contract. *Bragg* v. *Cole*, T. 2 *G.* 4. *Page* 114

2. Where the plaintiff on the sale of a barge by auction under an execution, addressed the company, stating that he had built it for the person against whom the execution was issued, who had not paid him for it; on which no person bid against him, but the auctioneer refused to knock it down to him at his first bidding, when a friend of his made another bidding, and the plaintiff advanced one shilling more, and paid a deposit in part of the purchase money:—Held, that he did not acquire any property in the barge under such sale. *Fuller* v. *Abrahams*, M. 2 *G.* 4. 316

VENUE.

See PRACTICE, 10.

VERDICT.

See PRACTICE, 1.

VESTED REMAINDER.

See DEVISE, 6.

WARDEN OF THE FLEET.

On a motion for an attachment against the Warden of the Fleet, for not bringing a defendant into Court under a writ of *habeas corpus*, one of his officers swore that the defendant had the benefit of the rules, but that he could not be found until after the time for bringing him into Court had expired, when he was confined within the prison until he was discharged under an order of the Insolvent Debtors' Court:—The rule for the attachment was ordered to be discharged, on the Warden's paying the costs of the application. *Park* v. *Torre*, M. 2 *G.* 4. *Page* 260

WARRANT OF ATTORNEY.

See AMENDMENT, 2.
MISNOMER.

WILL.

See DEVISE.

WINDOWS.

See ACTION ON THE CASE.

WITHDRAWING PLEAS.

See PLEADING, 2, 3.

WITNESS.

See BOND.
COSTS, 2.
DEED, 1.

WRIT.

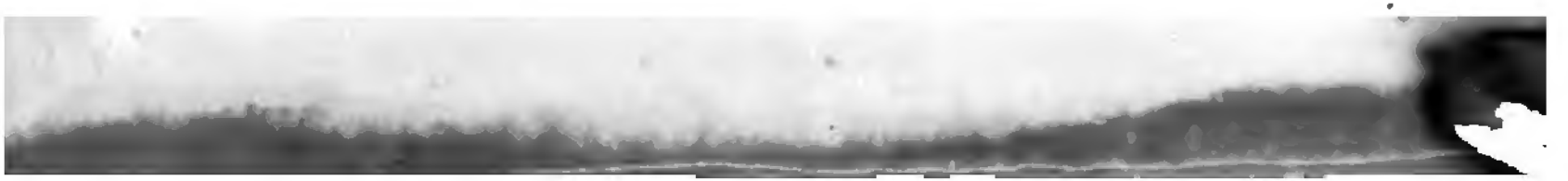
See SHERIFF.

WRIT OF ERROR.

See ERROR.

WRIT OF INQUIRY.

See INQUIRY, WRIT OF.

END OF THE SIXTH VOLUME.

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